APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-822

THE RENEGOTIATION BOARD, PETITIONER

v.

BANNERCRAFT CLOTHING COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED
DECEMBER 4, 1972
CERTIORARI GRANTED JANUARY 22, 1973

INDEX *

* The district courts orders are reproduced as an appendix to the petition for certiorari, Pet. App. 45a-60a. The decision of the Court of Appeals is reproduced at Pet. App. 1a-44a.

ASTRO COMMUNICATION LABORATORY

Relevant Docket Entries

1970

8-12 Complaint; Motion for Preliminary Injunction filed

8-18 Opposition to Motion for Preliminary Injunction filed

8-21 Order enjoining further renegotiation proceedings entered

9-29 Notice of appeal filed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASTRO COMMUNICATION LABORATORY, A Division of Aiken Industries, Inc. 9125 Gaither Road Gaithersburg, Maryland, PLAINTIFF, v. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 2403-70

COMPLAINT FOR INJUNCTION

(Pursuant to Public Law 90-23; 81 Stat. 54)

Plaintiff alleges:

1. Plaintiff is a Division of Aiken Industries, and has its principal offices in Gaithersburg, Maryland. Aiken Industries is a corporation, with its principal offices in New York City, New York. As of September 30, 1967, the end of the fiscal year here in issue, Plaintiff was a subsidiary corporation of Keltec Industries. Defendant is an agency of the United States of America, with its principal or "statutory" office in the District of Columbia. All of the documents sought by this action are physically situated at Defendant's offices in the District of Columbia. Jurisdiction is conferred on this court by 28 U.S.C. 1331 and 5 U.S.C. 552(a)(3).

2. Plaintiff brings this action to enjoin Defendant, its servants, agents, employees, and attorneys from withholding documents Plaintiff is rightfully entitled to under 5 U.S.C. 552 and further to temporarily restrain Defendant, its servants, agents, employees, and attorneys from conducting any further proceedings in connection with the renegotiation of Plaintiff's Fiscal Year 1967 until further order of this Court. By letter dated April 20, 1970, a copy of which is attached hereto as Exhibit A, Plaintiff requested that Defendant produce or otherwise make available for inspection and copying documents of five different classes, including:

(a) Documents forming a part of the Renegotiation

Report prepared in accordance with ¶ 1472.3(d) of the Renegotiation Board Regulations;

(b) Documents in the possession of the Defendant which relate to or analyze certain expenses of Plaintiff which had been disallowed or adjusted by Defendant in its Report of Renegotiation and Addendum No. 1 to the Report of Renegotiation issued to Plaintiff;

(c) Documents which constitute or relate to the "Information Received" which is stated under paragraph 2 of page 1 of Addendum No. 1 to the Report of Renegotiation and which is dated March 9, 1970, a copy of which is attached hereto as Exhibit B;

(d) Documents in the possession of Defendant which explain or relate to the denial made by Defendant in a letter dated May 20, 1969, a copy of which is attached as Exhibit C, denying the request of Plaintiff to file untimely an Application for Commercial Exemption; and

(e) To the extent not covered by paragraphs (a)-(d) above, documents in possession of Defendant which relate to the renegotiation of Plaintiff for the fiscal year in issue.

3. At a meeting with the Renegotiator in May 1970, Plaintiff was informed that the Eastern Regional Renegotiation Board had made a tentative determination that Plaintiff had realized excessive profits in the amount of $225,000. Plaintiff was also informed at that meeting that a hearing before the Eastern Regional Renegotiation Board had been scheduled for June 12, 1970.

4. In a letter dated April 17, 1970, Plaintiff had requested that Defendant postpone any hearing before the Eastern Regional Renegotiation Board until Plaintiff's request for production under 5 U.S.C. 552 had been complied with. As of June 10, 1970, Plaintiff had received no information from Defendant relating to continuance of the hearing which Defendant had scheduled for June 12, 1970. Therefore, on June 10, 1970, Plaintiff again wrote a letter to Defendant requesting a continuance of this hearing. By telephone call on June 11, 1970, Defendant agreed to postpone the hearing before the Eastern Regional Renegotiation Board.

5. By letter dated July 21, 1970, Defendant's General Counsel denied *in toto* Plaintiff's request for production of

documents under 5 U.S.C. 552. A copy of this letter is attached hereto as Exhibit D.

6. By letter dated July 30, 1970, Defendant affirmed the action of its General Counsel in denying in its entirety Plaintiff's request for production of documents pursuant to 5 U.S.C. 552.

7. By letter dated July 31, 1970, Plaintiff was informed that the hearing before the Eastern Regional Renegotiation Board, which had originally been scheduled for June 12, 1970, was scheduled for August 17, 1970. The letter further states "If this date is not convenient for you, please inform me as to which earlier date might be satisfactory."

8. By letter dated August 5, 1970, Plaintiff requested a continuance from the August 17 hearing date. Defendant thereupon rescheduled the hearing for August 24, 1970.

9. Plaintiff has been caused, and continues to be caused, irreparable injury by Defendant's wrongful failure to make available the records of Defendant referred to in paragraph 2 above and by Defendant's insistence that the renegotiation of Plaintiff's Fiscal Year 1967 proceed without Plaintiff having access to the records in question, which are essential for it to receive a due process hearing before both the Eastern Regional Renegotiation Board and The Renegotiation Board.

WHEREFORE, Plaintiff prays that:

(a) Defendant, its agents, employees, servants and attorneys, including those of the Eastern Regional Renegotiation Board, be enjoined from conducting any further proceedings in connection with the renegotiation of Plaintiff's Fiscal Year 1967 until further order of this court.

(b) Defendant, its agents, employees, servants and attorneys, including those of the Eastern Regional Renegotiation Board, be enjoined from withholding the documents specified in paragraph 2 above and in Exhibit A attached hereto, and be ordered to produce said documents for inspection and copying by Plaintiff.

(c) The court order such other and further relief as may be just and equitable.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY

/s/ James J. Gallagher
JAMES J. GALLAGHER
Attorneys for Plaintiff
Sellers, Conners & Cuneo
1625 K Street, N. W.
Washington, D. C. 20006
Tel. 347-0777

DATED: August 11, 1970

April 20, 1970

Mr. Nathan Bass
Secretary to the Board
The Renegotiation Board
1910 K Street, N.W.
Washington, D.C. 20446

REGISTERED MAIL
RETURN RECEIPT
REQUESTED

Re: Astro Communication Laboratory
FYE September 30, 1967
Assignment No. 89874-67-B

Dear Sir:

In accordance with 5 U.S.C. 552, the undersigned hereby requests and demands production for inspection and copying, and copying for the undersigned, at rates prescribed by Section 1480.12 of the Renegotiation Board Regulations, the following documents:

1. All documents, parts, provisions, and writings of every kind whatsoever constituting and forming a part of the Renegotiation Report for the above-captioned fiscal year of Astro Communications Laboratory, prepared in accordance with Paragraph 1472.3(d) of the Renegotiation Board Regulations.

2. All documents in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board of the captioned fiscal year of Astro Communications Laboratory, which documents analyze, summarize, discuss, relate to, or in any way bear upon Astro Communications' treatment, recording, reporting, control, or allocation of selling expenses including selling commission expense, advertising expense, operating loss carry-forwards, and corporate management fees.

3. To the extent not already covered hereinabove, all documents of every kind whatsoever in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board which constitute, comprise, relate to, bear upon, or discuss the "Information received" which is referred to in the first line under paragraph 2 of Addendum #1, dated March 9, 1970, which was sent to Astro Communications Laboratory by the Eastern Regional Renegotiation Board.

4. All documents of every kind whatsoever in the file

of the Renegotiation Board or in the file of the Eastern Regional Renegotiation Board which relate to, bear upon, discuss or explain the reasons for the order of the Renegotiation Board made on May 20, 1969 denying the request filed by Astro Communications Laboratory to file an untimely Application for Commercial Exemption.

5. To the extent not already covered hereinabove, all records, analyses, determinations, opinions, reports, or summaries containing, relating to, or bearing upon the renegotiation of Astro Communications Laboratory for the captioned fiscal year to the extent that such documents have been generated by and are in the custody of either the Eastern Regional Renegotiation Board or the Renegotiation Board.

The expeditious production of all the foregoing documents is absolutely necessary in order to enable Astro Communications Laboratory reasonably to continue the conduct of renegotiation before the Eastern Regional Renegotiation Board for the subject fiscal year.

It is requested that the documents identified herein be produced and copied for the undersigned as prescribed by the statute, complete in every respect and without omission of any portion or part thereof, except for deletions reasonably required by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, No. 22,635, decided on March 10, 1970.

The undersigned is willing, in advance of or at the time of receipt of the documents requested herein, to pay such fees for these documents as have been prescribed by Section 1480.12 of the Renegotiation Board Regulations.

If for any reason whatsoever the production of the documents requested herein, *or any portion thereof*, is determined by the General Counsel of the Renegotiation Board to be unallowable in accordance with Section 1480.7(d), or for any other reason is not allowed, made, and accomplished within a reasonable time from the request and demand herein, this request and demand shall constitute a request for review by the Renegotiation Board of the denial and disallowance in accordance with Section 1480.7(e) of the Renegotiation Board Regulations, and this letter shall be deemed to constitute a request for review pursuant to such regulation.

It is hereby requested that you communicate at your earliest convenience with the undersigned, indicating the total fees which will be charged for the production of the documents herein requested and the extent of time which will be necessary for this production.

Very truly yours,

HERBERT L. FENSTER

April 17, 1970

Eastern Regional
Renegotiation Board
1325 K Street, N.W.
Washington, D.C. 20447

ATTENTION: Mr. Ray Johnson

Re: Renegotiation FYE September 30, 1967
Assignment No. 89874-67-B

Gentlemen:

This firm and the undersigned represent Astro Communication Laboratory and Aiken Industries, Inc., in connection with the subject renegotiation matter.

This will confirm a telephone conversation of April 16, 1970, with Mr. Ray Johnson of the Eastern Regional Renegotiation Board. In accordance with paragraphs 1472.3(f), the contractor requests a renegotiation conference. Further, in accordance with paragraph 1472.3(h), the contractor requests a panel meeting to be held at a date after the renegotiation conference.

Under separate letter to Mr. Nathan Bass, Secretary, Renegotiation Board, appellant has, in accordance with 5 U.S.C. 552, requested certain documents and information relating to the subject renegotiation case. Since the contractor believes that the furnishing of these documents by the Renegotiation Board will have a material bearing upon the continued conduct of the proceedings before the Eastern Regional Renegotiation Board, the contractor hereby requests that the renegotiation conference and the panel meeting both be postponed until the requested documents are received and analyzed by the contractor.

Very truly yours,
HERBERT L. FENSTER

bc: Mr. Woodbury
Mr. Rasavage
Mr. Marantis

HLF:clw

June 10, 1970

Eastern Regional Renegotiation Board
1325 K Street, N.W.
Washington, D.C. 20447

Re: Renegotiation, Fiscal Year Ended
September 30, 1967
Assignment No. 89874-67-B

Gentlemen:

This firm and the undersigned represent Astro Communication Laboratory and Aiken Industries, Inc. in connection with the subject renegotiation matter.

Approximately six weeks ago, we sent a letter to the Secretary of the Renegotiation Board requesting the production for inspection and copying of certain documents in accordance with 5 U.S.C. 552. In our letter, dated April 17, 1970, we requested that the panel meeting before the Eastern Regional Renegotiation Board be postponed until the requested documents were received and analyzed by the contractor. We have received no response to our request for production under 5 U.S.C. 552, nor have we received any acknowledgment of our request for postponement of the panel meeting.

Therefore, we again request that the panel meeting, now scheduled to be held on June 12, 1970, be postponed until such time as the Renegotiation Board has responded to our request for production under 5 U.S.C. 552. (See *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, No. 22635, Decided on March 10, 1970; *Bannercraft Clothing Company v. The Renegotiation Board*, Civil Action No. 1340-70, Preliminary Injunction dated May 15, 1970; and *Holly Corporation*, Renegotiation, Fiscal Years 1962-1964.)

Sincerely yours,

JAMES J. GALLAGHER

Jul 30, 1970

Herbert L. Fenster, Esq.
Messrs. Sellers, Conner & Cuneo
1625 K Street, NW
Washington, D.C. 20006

Re: Astro Communication Laboratory
FYE September 30, 1967
Assignment No. 89874-67-B

Dear Mr. Fenster:

This is in response to your letter dated April 20, 1970, requesting access on behalf of Astro Communication Laboratory to records of the Board, pursuant to 5 U.S.C. 552. Your letter was referred to me in accordance with RBR 1480.7(b).

I have concluded as follows with respect to the items set forth in your request:

Item 1

All documents, parts, provisions, and writings of every kind whatsoever constituting and forming a part of the Renegotiation Report for the above-captioned fiscal year of Astro Communications Laboratory, prepared in accordance with Paragraph 1472.3(d) of the Renegotiation Board Regulations.

The records of the Board show that a copy of the accounting section of the Report of Renegotiation was furnished to the contractor on August 28, 1969, upon its request, pursuant to RBR 1472.3(d). In my opinion, the remainder of that report is exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7).

Item 2

All documents in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board of the captioned fiscal year of Astro Communications Laboratory, which documents analyze, summarize, discuss, relate to, or in any way bear upon Astro Communications' treatment, recording, reporting, control,

or allocation of selling expenses including selling commission expense, advertising expense, operating loss carry-forwards, and corporate management fees.

Item 3

To the extent not already covered hereinabove, all documents of every kind whatsoever in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board which constitute, comprise, relate to, bear upon, or discuss the "Information received" which is referred to in the first line under paragraph 2 of Addendum #1, dated March 9, 1970, which was sent to Astro Communications Laboratory by the Eastern Regional Renegotiation Board.

Item 5

To the extent not already covered hereinabove, all records, analyses, determinations, opinions, reports, or summaries containing, relating to, or bearing upon the renegotiation of Astro Communications Laboratory for the captioned fiscal year to the extent that such documents have been generated by and are in the custody of either the Eastern Regional Renegotiation Board or the Renegotiation Board.

RBR 1480.6(b) provides that a person who requests access to a record of the Board pursuant to 5 U.S.C. 552 (a)(3) must provide a reasonably specific description of the particular record sought, and that the Board will not comply with a request that does not provide a sufficient description, or with a general or blanket request.

In my opinion, you have not, in Items 2, 3 and 5 of your letter, provided reasonably adequate descriptions of particular records. Further, in my opinion, any such records are within the exemptions provided in 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7). In addition, Part 1A of the Report of Renegotiation sets forth the expenses referred to in Items 2 and 3, as reported by the contractor in its renegotiation filing for 1967, together with the adjustments made by the regional board.

Item 4

All documents of every kind whatsoever in the file of

the Renegotiation Board or in the file of the Eastern Regional Renegotiation Board which relate to, bear upon, discuss or explain the reasons for the order of the Renegotiation Board made on May 20, 1969 denying the request filed by Astro Communications Laboratory to file an untimely Application for Commercial Exemption.

In my opinion, the records sought in this item are exempt under 5 U.S.C. 552(b)(3), (4) and (5) and RBR 1480.9 (a)(3), (4) and (5).

RBR 1480.7(e) provides that you may obtain a review of this decision by the Renegotiation Board by filing a request therefor, within 20 days after the date of this letter. Your letter of April 20, 1970 states:

> If for any reason whatsoever the production of the documents requested herein, *or any portion thereof,* is determined by the General Counsel of the Renegotiation Board to be unallowable in accordance with Section 1480.7(d), * * * this request and demand shall constitute a request for review by the Renegotiation Board of the denial and disallowance in accordance with Section 1480.7(e) of the Renegotiation Board Regulations, and this letter shall be deemed to constitute a request for review pursuant to such regulation.

Accordingly, having concluded that you are not entitled under 5 U.S.C. 552 to access to records of the Board in accordance with the items of your request, I have referred this decision to the Board for review.

Very truly yours,

/s/ Howard W. Fensterstock
HOWARD W. FENSTERSTOCK
General Counsel

Jul 30, 1970

Herbert L. Fenster, Esq.
Messrs. Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

Re: Astro Communication Laboratory
FYE September 30, 1967
Assignment No. 89874-67-B

Dear Mr. Fenster:

In accordance with your letter dated April 20, 1970, and RBR 1480.7(e), the Board has reviewed the action of its General Counsel, as set forth in his letter of July 21, 1970 to you, denying your request on behalf of Astro Communication Laboratory for access to records of the Board pursuant to 5 U.S.C. 552.

As a result of such review, the Board has approved the action of the General Counsel. Your request is denied, to the extent and for the reasons set forth in his letter.

Very truly yours,

/s/ Nathan Bass
NATHAN BASS
Secretary to the Board

EASTERN REGIONAL RENEGOTIATION BOARD

1325 K Street, NW.
Washington, D.C. 20447

Aug 6, 1970

Mr. James J. Gallagher
Sellers, Conner & Cuneo
Attorneys and Counselors
Commonwealth Building
1625 K Street, N.W.
Washington, D.C. 20006

Subject: Astro Communication Laboratory
Assignment No. 89874-67-B
FYE: September 30, 1967

Dear Mr. Gallagher:

Confirming our telephone conversation of August 6, 1970. The Panel Meeting for Astro Communication Laboratory originally scheduled for August 17, 1970, has been postponed until August 24, 1970. This meeting will be held at the Eastern Regional Renegotiation Board, 1325 K Street, N. W., at 1:30 p.m.

Very truly yours,

/s/ Frank S. Howell
FRANK S. HOWELL
Board Member

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASTRO COMMUNICATION LABORATORY, A Division of Aiken Industries, Inc., PLAINTIFF, v. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 2403-70

MOTION FOR PRELIMINARY INJUNCTION

To: Defendant, The Renegotiation Board, and its Attorneys.

Plaintiff moves the court for a Preliminary Injunction enjoining Defendant, their agents, servants and employees, including those of Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, or in any way acting upon the renegotiation of Plaintiff for Plaintiff's Fiscal Year 1967, pending the final decision of this court on Plaintiff's Complaint, on the grounds that:

1. Continuation of renegotiation proceedings without the availability to Plaintiff of the documents specified in paragraph 2 of its Complaint would cause Plaintiff to be unable adequately, reasonably, or fairly to present its position in such renegotiation proceedings, and would result in determinations by Defendant which were unfair, inequitable, invalid, and confiscatory. Such determinations without an opportunity for Plaintiff to inspect such documents would deny Plaintiff due process of law in the pending renegotiation proceedings.

2. The production for Plaintiff's inspection of the documents specified in Paragraph 2 of Plaintiff's Complaint is absolutely essential to the conduct of renegotiation for Plaintiff's Fiscal Year 1967, or Plaintiff will be effectively denied any reasonable administrative remedy and procedure as contemplated by The Renegotiation Act of 1951, 50 App. U. S. Code 1210, *et seq.*

3. Defendant is unreasonably and wrongfully withholding production of the documents requested by Plaintiff.

4. The granting of a Preliminary Injunction herein will not cause undue delay or loss to Defendant, but will prevent irreparable injury to Plaintiff.

This motion will be based on this notice of motion, on the affidavit of Ken Shen, and all of the other pleadings and papers on file in this action.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY

/s/ James J. Gallagher
JAMES J. GALLAGHER

Attorneys for Plaintiff

Sellers, Conner & Cuneo
1625 K Street, N. W.
Washington, D. C. 20006
Tel. 347-0777

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASTRO COMMUNICATION LABORATORY, A Division of Aiken Industries, Inc. 9125 Gaither Road Gaithersburg, Maryland, PLAINTIFF, V. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 2403-70

AFFIDAVIT OF KEN SHEN

I, KEN SHEN, having been first duly sworn, now depose and say that:

1. I am President of Astro Communication Laboratory, which is a division of Aiken Industries, Inc. At the end of the fiscal year which is the subject of the renegotiation proceeding here in issue, Astro Communication Laboratory was a subsidiary of Keltec Industries. I was President of Astro Communication Laboratory at that time, also. I am thoroughly familiar with the company's records relating to renegotiation and with the actions and activities of the Plaintiff and the Renegotiation Board in connection with the renegotiation of Plaintiff's Fiscal Year 1967.

2. In accordance with the Renegotiation Act of 1951, Plaintiff timely filed the Standard Form of Contractor's Report for Renegotiation (otherwise designated "RB Form 1") for its Fiscal Year 1967.

3. On April 20, 1970, Plaintiff sent a letter to the Secretary of the Renegotiation Board requesting the production for inspection and copying, in accordance with 5 U.S.C. § 552 (the Public Information Act Amendment), of certain documents. A copy of this letter is attached to the Complaint filed herein as Exhibit A.

4. At a meeting with a representative of the Renegotiation Board in May 1970, Plaintiff was informed that the Eastern Regional Renegotiation Board had made a tentative determination that Plaintiff had realized excessive profits of $225,000 in its Fiscal Year 1967.

5. By letter dated July 21, 1970, the General Counsel of the Renegotiation Board, Howard W. Fensterstock, denied each and every request for documents contained in Plaintiff's letter of April 20, 1970.

6. By letter dated July 30, 1970, the Renegotiation Board approved the action of its General Counsel and affirmed the denial of Plaintiff's request for documents.

7. On August 3, 1970, Plaintiff received a letter from the Eastern Regional Renegotiation Board informing it that a hearing had been scheduled before that Board on August 17, 1970. The letter further stated that if that date was inconvenient for the Plaintiff, it could request a hearing on any earlier date.

8. Plaintiff's counsel had a prior commitment outside the Washington, D. C. area on August 17, 1970. Plaintiff requested that the hearing before the Eastern Regional Renegotiation Board be continued to the week of August 24, 1970. By telephone call on August 6, 1970, and letter dated the same day, that request was granted and the hearing was re-scheduled for August 24, 1970.

9. It reasonably appears that the Eastern Regional Renegotiation Board relied materially upon documents in its possession, including remaining portions of its "Report," which were not made available to plaintiff, in reaching its tentative determination of excessive profits. Plaintiff has been unable to respond to the information contained therein, which information appears to be erroneous, inaccurate or misleading, and Plaintiff has therefore been, and continues to be, unable reasonably to avail itself of the administrative proceeding established by Defendant.

10. In the absence of an adequate administrative remedy, and upon a determination of excessive profits by the Eastern Regional Renegotiation Board and thereafter by the Renegotiation Board, Plaintiff will have no reasonable recourse than to pay any amounts determined or to make very substantial partial payments against such amounts and incur substantial interest costs on the remainder, pending any review (as provided by the Renegotiation Act of 1951) by the Tax Court of the United States. Such events would cause Plaintiff irreparable damage.

/s/ K. Shen
KEN SHEN

DISTRICT OF COLUMBIA ss

Sworn and subscribed to before me this 11th day of August 1970.

/s/ Irene L. Jarvis
Notary Public

My Commission Expires Aug. 31, 1970

BANNERCRAFT CLOTHING COMPANY

BANNERCRAFT CLOTHING COMPANY

Relevant Docket Entries

1970

5- 1 Complaint; Application for Temporary Restraining Order; Motion for Preliminary Injunction filed

5- 5 Motion of Defendant to Dismiss and in Opposition to Plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction filed

5- 6 Order denying motion to dismiss

5- 6 Order granting motion for temporary restraining order

5-15 Order granting motion for preliminary injunction

7-10 Notice of appeal from order of 5-15-70 filed

8- 4 Motion to dissolve preliminary injunction filed

8-10 Opposition to Motion to dissolve preliminary injunction

8-13 Order denying Motion to dissolve preliminary injunction

8-28 Notice of appeal from order of 8-13-70 filed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC. 1234 Carpenter Street Philadelphia, Pennsylvania 19147, PLAINTIFF, v. THE RENEGOTIATION BOARD 1910 K Street, N. W. Washington, D. C. 20006, DEFENDANT.	Civil Action No. 1340-70

COMPLAINT FOR INJUNCTION

(Pursuant to Public Law 90-23; 81 Stat. 54)

Plaintiff alleges:

1. Plaintiff is a corporation with its principal offices in Philadelphia, Pennsylvania. Defendant is an agency of the United States of America, with its principal or "statutory" office in the District of Columbia. All of the documents sought by this action are physically situated at Defendant's offices in the District of Columbia. Jurisdiction is conferred on this Court by 28 U.S.C. 1331 and 5 U.S.C. 552(a)(3).

2. Plaintiff brings this action to temporarily restrain Defendant, their servants, agents, employees and attorneys from conducting any further proceedings in connection with the renegotiation of plaintiff's Fiscal Years 1966 and 1967 until further order of this Court and further to enjoin Defendant, their servants, agents, employees and attorneys from withholding documents Plaintiff is rightfully entitled to under 5 U.S.C. 552.

3. By letter dated February 20, 1970, a copy of which is attached hereto as Exhibit A, Plaintiff was notified by the Eastern Regional Renegotiation Board that a final recommendation had been made that for Plaintiff's Fiscal Year 1967, it had realized excessive profits of $1,400,000.00. By letter dated November 25, 1969, Plaintiff was notified that the Eastern Regional Renegotiation Board had made a final determination of excessive profits in the amount of $75,000 for Plaintiff's Fiscal Year 1966.

4. By letter dated February 24, 1970, a copy of which is attached hereto as Exhibit B, Plaintiff requested that it be furnished, pursuant to the Renegotiation Board's Regulations, a written summary of the facts and reasons upon which the Board's determination for Plaintiff's Fiscal Year 1967 was based.

5. The Eastern Regional Renegotiation Board responded to Plaintiff's request by letter dated March 2, 1970, a copy of which is attached hereto as Exhibit C, wherein Plaintiff was informed that its request was "defective" because it had not made the required statement to the effect that the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings; and, therefore, the summary of facts and reasons would not be supplied until such time as the request was perfected.

6. Plaintiff replied to the Board's letter of March 2, 1970, by letter dated March 9, 1970, a copy of which is attached hereto as Exhibit D, wherein it is stated:

> . . . The required statement is somewhat meaningless when we do not have a written statement of the issues upon which you have made your finding. However, to comply with the requirements of the regulations, the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings. Please send me the Summary of Facts and Reasons.

7. The Summary of Facts and Reasons for Fiscal Year 1967 was sent to Plaintiff by the Eastern Regional Renegotiation Board on March 16, 1970. That document indicated that of Plaintiff's total profits for renegotiation of $1,739,000.00, Defendant had determined that $1,400,000.00 constituted excessive profits.

8. By letter dated March 16, 1970, a copy of which is attached as Exhibit E, Plaintiff requested that Defendant produce or otherwise make available to inspection documents of six different classes, including:

> (a) Interagency communications relating to Plaintiff's bidding, award and performance of its renegotiable contracts for the Fiscal Years 1966 and 1967.
>
> (b) Investigatory reports prepared by the Board containing facts relevant to the Board's determination as to Plaintiff for its Fiscal Years 1966 and 1967.
>
> (c) Opinions, orders, determinations and other docu-

ments generated by Defendant relating to eleven named companies for the years 1962 through 1968.

(d) The identification of those coat manufacturers with whom Plaintiff was compared, as was stated on page 4 of the Summary of Facts and Reasons for 1966.

(e) The "procurement information" described on page 4 of the Summary of Facts and Reasons for 1966, which the Board contends indicated there was a lack of effective price competition.

Plaintiff has never received a response to this request.

9. On April 10, 1970, Plaintiff met with representatives of Defendant. At the beginning of that meeting, Plaintiff requested that the meeting be stayed until Defendant determined what course it would follow pursuant to the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board*, No. 22,635, Decided March 10, 1970. Defendant denied Plaintiff's request and continued on with the meeting.

10. By letters dated April 29, 1970, copies of which are attached as Exhibits F and G, Plaintiff was informed that The Renegotiation Board had determined that Plaintiff had realized excessive profits of $75,000 in 1966 and $1,450,000 in 1967. This latter figure is $50,000 larger than the amount determined by the Eastern Regional Renegotiation Board, yet not one word of explanation regarding this $50,000 was offered by Defendant.

Plaintiff must inform Defendant prior to May 12, 1970, whether or not it will agree to Defendant's determinations. If Plaintiff does not agree, Defendant will issue a unilateral order providing for the payment to the Government of the entire amount determined to be excessive profits.

11. Plaintiff has been caused and continues to be caused irreparable injury by Defendant's refusal to stay the renegotiation proceedings for Plaintiff's Fiscal Years 1966 and 1967 and by Defendant's failure to make available the records of Defendant referred to in paragraph 8 above.

WHEREFORE, Plaintiff prays that:

(a) Defendant, their agents, employees, servants and attorneys, including those of the Eastern Regional Renegotiation Board, be enjoined from conducting any further proceedings in connection with the renegotia-

tion of Plaintiff's Fiscal Years 1966 and 1967 until further order of this Court.

(b) Defendant, their agents, employees, servants and attorneys, including those of the Eastern Regional Renegotiation Board, be enjoined from withholding the documents specified in Paragraph 8 above, and in "Exhibit E" attached hereto, and be ordered to produce said documents for inspection and copying by Plaintiff.

(c) The Court order such other and further relief as may be just and equitable.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY
Attorney for Plaintiff

Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

ST 3-0600

EXHIBIT A

EASTERN REGIONAL RENEGOTIATION BOARD

1325 K Street, N.W.
Washington, D.C. 20447

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Feb. 20, 1970

Bannercraft Clothing Company, Inc.
1234 Carpenter Street
Philadelphia, Pennsylvania 19147

Reference: Case No. 83655-67-A

Gentlemen:

Pursuant to the provisions of Section 1472.3(i) of the Renegotiation Board Regulations, you are hereby notified by registered mail that, at a meeting held on February 16, 1970, the Eastern Regional Renegotiation Board made a final recommendation that during the fiscal year ended December 31, 1970, Bannercraft Clothing Company, Inc. realized excessive profits from contracts and subcontracts subject to the Renegotiation Act of 1951, as amended, in the amount of $1,400,000. Such amount of excessive profits is subject to a proper adjustment on account of State taxes measured by income and to the tax credit to which the contractor may be entitled under Section 1481 of the Internal Revenue Code of 1954.

Please advise us not later than March 2, 1970 whether you wish to enter into a Renegotiation Agreement embodying the recommendation stated above.

Very truly yours,

Eastern Regional Renegotiation Board
By Herbert G. Hart
HERBERT G. HART
Chairman

CC: Mr. William B. Downs
Tait, Weller & Baker

Mr. Richard H. Wathen, Esq.
Sellers, Conner & Cuneo

EXHIBIT B

February 24, 1970

Mr. Herbert G. Hart, Chairman
Eastern Regional Renegotiation Board
1325 K Street, N.W.
Washington, D.C. 20447

Re: Case No. 83655-67-A

Dear Sir:

This will acknowledge receipt of your letter of February 20 to Bannercraft Clothing Company, Inc. concerning the above case. You are requested to furnish the contractor, pursuant to Section 1477.3 of the Regulations, a written summary of the facts and reasons upon which the determination was based to assist the contractor in determining whether it should enter into a Renegotiation Agreement. Prior to reviewing the summary of facts and reasons, it is not possible to state whether all relevant evidence has been submitted since we have never had in writing the basis upon which you made this determination.

Obviously, the contractor cannot advise you by March 2, 1970 whether it wishes to enter into a Renegotiation Agreement but, if that is the final date, the answer at this point must be in the negaive.

Very truly yours,

ROBERT L. ACKERLY

RLA:js

bc: Mr. Mickey Bennett

EXHIBIT C

EASTERN REGIONAL RENEGOTIATION BOARD
1325 K Street, N.W.
Washington, D.C. 20447

Mar. 2, 1970

Robert L. Ackerly, Esq.
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

Subject: Bannercraft Clothing Company, Inc.
Case No. 83655-67-A
Fiscal year ended December 31, 1967

Dear Mr. Ackerly:

Thank you for your letter of February 24, 1970 on behalf of Bannercraft Clothing Company, Inc. Your letter requests a Summary of Facts and Reasons pursuant to the provisions of RBR 1477.3. However, you do not make the statement required by the regulation that the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings. Accordingly, your request for a summary is defective. In view of these circumstances, the contractor will be allowed an additional time, until March 9, 1970, to advise the Board whether it is willing to enter into a renegotiation agreement for the amount of excessive profits stated in the letter of February 20, or within which to perfect its request for a Summary of Facts and Reasons.

If the request for a Summary of Facts and Reasons under RBR 1477.3 is perfected, the contractor will be allowed a reasonable time after such summary is furnished to the contractor to decide whether it is willing to enter into a renegotiation agreement.

Very truly yours,

/s/ Herbert G. Hart
HERBERT G. HART
Chairman

CC: Bannercraft Clothing Company, Inc.

EXHIBIT D

March 9, 1970

Mr. Herbert G. Hart
Chairman
Eastern Regional Renegotiation Board
1325 K Street, N.W.
Washington, D.C. 20047

Re: Bannercraft Clothing Company, Inc.
Case No. 83655-67-A
Fiscal Year Ended December 31, 1967

Dear Mr. Hart:

This replies to your letter of March 2. Bannercraft Clothing Company, Inc. does wish to have a Summary of Facts and Reasons pursuant to the provisions of RBR 1477.3. You insist upon a statement that the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings. Since this is a prerequisite to supplying the summary, we make this statement; however, it is without prejudice to an opportunity to offer evidence on the issues disclosed by the Summary of Facts and Reasons. The required statement is somewhat meaningless when we do not have a written statement of the issue upon which you have made your finding. However, to comply with the requirements of the regulations, the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceeding. Please send me the Summary of Facts and Reasons.

Very truly yours,
ROBERT L. ACKERLY

RLA:rmj

EXHIBIT E

SELLERS, CONNER & CUNEO
Formerly
CUMMINGS & SELLERS
Attorneys and Counselors
Commonwealth Building
1625 K Street, Northwest
Washington, D.C. 20006

March 16, 1970

Nathan Bass, Secretary
The Renegotiation Board
1910 K Street, N.W.
Washington, D.C.

Re: Bannercraft Clothing Company, Inc.
Fiscal Years 1966 and 1967

Dear Mr. Bass:

Pursuant to 5 U.S.C. § 552 and the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board*, No. 22,635, decided March 10, 1970, request is hereby made that you make available to the undersigned, as counsel for Bannercraft, the following records for the purpose of inspection and/or copying:

1. Interdepartmental and interagency communications between The Renegotiation Board and other Government agencies with respect to Bannercraft's bidding, award and performance of its renegotiable contracts for the fiscal years 1966 and 1967.

2. Investigatory or other factual reports prepared by employees of the Board containing facts which are relevant to the Board's determination as to Bannercraft's renegotiable contracts for the years 1966 and 1967.

3. The final opinions, determinations, unilateral orders, agreements, clearance notices, letters not to proceed, and the summaries of facts and reasons on which unilateral orders, agreements, or determinations are based for the years 1962 through 1968 for the following companies:

Hart-Schaeffer & Marx—Chicago
Botany 500—Philadelphia
M. Wile & Sons—Buffalo, New York
Joseph H. Cohen & Sons—Philadelphia
Pincus Brothers
College Hall Fashions
Gutman & Sons—Philadelphia
Pembroke Clothing—Egg Harbor, New Jersey
Hirst Tyler & Company—Philadelphia
Amerson Clothing Company—Pleasantville, New Jersey
Gramaton Clothing—Fort River, Massachusetts

4. The facts upon which The Renegotiation Board concluded that Bannercraft's pricing policy was unreasonable in 1966.

5. An identification of those coat manufacturers with whom Bannercraft's available cost of production was compared as stated on page 4 of the Summary of Facts and Reasons for 1966, and with respect to each such manufacturer, deleting therefrom where necessary, such identification in the data as may be required, the same data described in paragraph 3 above.

6. The "procurement information" described on page 4 of the Summary of Facts and Reasons for 1966 which was reviewed and which the Board contends indicated that there was a lack of effective price competition. It is requested that this data be made available in detail and, to the extent that it may be included in requests heretofore stated, that it be identified as the data upon which the Board reached the conclusion that there was a lack of effective price competition.

As soon as these documents can be made available, I would appreciate your notifying me so I can make prompt and appropriate arrangements to inspect and copy these documents.

Very truly yours,

/s/ Robert L. Ackerly
ROBERT L. ACKERLY

RLA:js

bc: Mr. Mickey Bennett
Mr. William B. Downes

EXHIBIT F

THE RENEGOTIATION BOARD
Washington, D.C. 20446

REGISTERED-RETURN
RECEIPT REQUESTED

Apr. 29, 1970

Bannercraft Clothing Company, Inc.
1234 Carpenter Street
Philadelphia, Pennsylvania 19147

Attention: Mr. Mickey Bennett
President

Subject: Renegotiation Proceedings—
BANNERCRAFT CLOTHING
COMPANY, INC.
Fiscal Year Ended December 31, 1966

Gentlemen:

Upon review of the unilateral determination which was entered by the Eastern Regional Renegotiation Board in the amount of $75,000 ($68,556 after adjustment on account of state income taxes) for your fiscal year ended December 31, 1966, The Renegotiation Board has likewise determined that you received or accrued excessive profits in the amount of $75,000 ($64,921 after adjustment on account of state income taxes, as recomputed).

It is required that this determination be embodied in a bilateral agreement or in an order of the Board.

Will you please let the undersigned know not later than May 12, 1970, whether you wish to enter into a bilateral agreement, or whether the Board should proceed to issue a bilateral order, providing for the payment to the Government of the sum of $64,921. This amount is subject to reduction, of course, by any applicable credit for Federal income taxes as provided in the Internal Revenue Code.

Very truly yours,

Signed: Nathan Bass
NATHAN BASS
Secretary to the Board

cc: Robert L. Ackerly, Esq.
Sellers, Conner & Cuneo
Tait, Weller & Baker
Certified Public Accountants
Attention: Mr. William B. Downes

EXHIBIT G

THE RENEGOTIATION BOARD
Washington, D.C. 20446

REGISTERED-RETURN
RECEIPT REQUESTED

Apr. 29, 1970

Bannercraft Clothing Company, Inc.
1234 Carpenter Street
Philadelphia, Pennsylvania 19147

Attention: Mr. Mickey Bennett
President

Subject: Renegotiation Proceedings—
BANNERCRAFT CLOTHING
COMPANY, INC.
Fiscal Year Ended December 31, 1967

Gentlemen:

Upon consideration of the above proceedings, The Renegotiation Board has determined that you realized excessive profits in the amount of $1,450,000 ($1,431,097 after adjustment on account of state income taxes) for the fiscal year indicated. (The Eastern Regional Renegotiation Board previously determined that you realized excessive profits of $1,400,000—$1,377,827 after adjustment on account of state income taxes—for this fiscal year.)

It is required that the Board's determination be embodied in a bilateral agreement or in an order of the Board.

Will you please let the undersigned know not later than May 12, 1970, whether you wish to enter into a bilateral agreement, or whether the Board should proceed to issue a unilateral order, providing for the payment to the Government of the sum of $1,431,097. This amount is subject to reduction, of course, by any applicable credit for Federal income taxes as provided in the Internal Revenue Code.

Very truly yours,

Signed: Nathan Bass
NATHAN BASS
Secretary to the Board

cc: Robert L. Ackerly, Esq.
Sellers, Conner & Cuneo

Tait, Weller & Baker
Certified Public Accountants
Attention: Mr. William B. Downes

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.
1234 Carpeter Street
Philadelphia, Pensylvania 19147,
PLAINTIFF,

v.

THE U.S. RENEGOTIATION BOARD,
DEFENDANT.

Civil Action No.—

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiff, Bannercraft Clothing Company, Inc., applies, pursuant to Rule 65-b, Federal Rules of Civil Procedure, for a Temporary Restraining Order, restraining and enjoining Defendant and its agents, servants and employees, including those of Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, or in any way acting upon the Renegotiation of Plaintiff for Plaintiff's Fiscal Years 1966 and 1967 on the grounds that immediate and irreparable injury, loss, and damage would result to the Plaintiff before a hearing can be had herein, as more fully appears in the Complaint and Affidavit attached hereto.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY
Attorney for Plaintiff
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006
ST 3-0600

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING CO., INC.
Philadelphia, Pennsylvania,
PLAINTIFF,

v.

THE RENEGOTIATION BOARD
DEFENDANT.

Civil Action No. ——

AFFADAVIT OF JAMES J. GALLAGHER

I, JAMES J. GALLAGHER, having been first duly sworn, now depose and say that:

1. I am Special Counsel to Bannercraft Clothing Co., Inc. (hereinafter "Plaintiff"), providing legal services to Plaintiff in connection with requirements of Plaintiff under the Renegotiation Act of 1951. I am thoroughly familiar with the company's records relating to renegotiation and with the actions and activities of Plaintiff and the Renegotiation Board in connection with renegotiation of Plaintiff's Fiscal Years 1966 and 1967.

2. In accordance with the Renegotiation Act of 1951, Plaintiff timely filed its Standard Form of Contractor's Report for Renegotiation (otherwise designated "RB Form 1") for its Fiscal Years 1966 and 1967.

3. On December 29, 1969 and March 16, 1970, Defendant sent Plaintiff its Summary of Facts and Reasons for Plaintiff's Fiscal Years 1966 and 1967, respectively. These documents purport to set forth the underlying reasons for Defendant's determination of excessive profits. Statements made in both of these documents, in some instances expressly, in some implicitly, refer to other documents which are in the possession of Defendant for their support, which documents were and are unknown to Plaintiff. In addition, certain material portions of these documents were in error, or were otherwise erroneous, inaccurate, and unsupported.

4. Final deteminations that Plaintiff realized excessive profits of $75,000 in Fiscal Year 1966 and $1,400,000 in Fiscal Year 1967 were made by the Eastern Regional Renegotiation Board on November 25, 1969 and February 20, 1970, respectively.

By letters dated April 29, 1970, the Renegotiation Board made final determinations that Plaintiff realized excessive profits of $75,000 in Fiscal Year 1966 and $1,450,000 in Fiscal Year 1967. Plaintiff does not know what accounts for the $50,000 difference between the determination for Fiscal Year 1967 made by the Eastern Regional Renegotiation Board and that made by the Renegotiation Board.

Plaintiff has been given until May 12, 1970 to agree to the Defendant's determination. If Plaintiff does not agree, Defendant will issue a unilateral order providing for the payment to the Government of the entire amount determined to be excessive profits.

5. On March 16, 1970, Plaintiff sent a letter to the Secretary of the Renegotiation Board requesting the production for inspection and copying, in accordance with 5 U.S.C. 552 (the Public Information Act Amendment), of certain documents. No response to this request has been received by Plaintiff.

6. On April 10, 1970, Plaintiff met with representatives of Defendant. At the beginning of that meeting Plaintiff requested that the meeting be stayed until Defendant determined what course it would follow pursuant to the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board,* No. 22,635, decided March 10, 1970. Defendant denied Plaintiff's request and continued with the meeting.

7. It reasonbly appears that Defendant relied materially upon documents in its possession, including the remaining portions of its "Report," which were not made available to Plaintiff, in reaching its determination of excessive profits. Plaintiff has been unable to respond to the information therein contained, which information appears to be erroneous, inaccurate, or misleading, and Plaintiff has therefore been and continues to be unable reasonably to avail itself of the administrative proceeding established by Defendant.

8. In the absence of an adequate administrative remedy and upon a determination of excessive profits by Defendant, Plaintiff will have no reasonable recourse other than to pay any amounts determined or to make very substantial partial payments against such amounts and incur substantial interest costs on the remainder, pending any review (as pro-

vided by the Renegotiation Act of 1951) by the Tax Court of the United States. Such events would cause Plaintiff irreparable damage.

/s/ James J. Gallagher
JAMES J. GALLAGHER

DISTRICT OF COLUMBIA ss

Sworn and subscribed to before me this 1st day of May, 1970.

/s/ Irene L. Jarvis
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.
1234 Carpenter Street
Philadelphia, Pennsylvania 19147,
PLAINTIFF,

v.

THE U.S. RENEGOTIATION BOARD,
DEFENDANT.

Civil Action No.—

MOTION FOR PRELIMINARY INJUNCTION

TO: DEFENDANT, THE RENEGOTIATION BOARD, AND ITS ATTORNEYS.

Plaintiff moves the court for a Preliminary Injunction enjoining Defendant, their agents, servants and employees, including those of Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, or in any way acting upon the renegotiation of Plaintiff for Plaintiff's Fiscal Years 1966 and 1967, pending the final decision of this court on Plaintiff's Complaint, on the grounds that:

1. Continuation of renegotiation proceedings without the availability to Plaintiff of the documents specified in Paragraph 8 of its Complaint would cause Plaintiff to be unable adequately, reasonably, or fairly to present its position in such renegotiation proceedings, and would result in determinations by Defendant which were unfair, inequitable, invalid, and confiscatory. Such determinations without an opportunity for Plaintiff to inspect such documents would deny Plaintiff due process of law in the pending renegotiation proceedings.

2. The production for Plaintiff's inspection of the documents specified in Paragraph 8 of Plaintiff's Complaint is absolutely essential to the conduct of renegotiation for Plaintiff's Fiscal Years 1966 and 1967, or Plaintiff will be effectively denied any reasonable administrative remedy and procedure as contemplated by The Renegotiation Act of 1951, 50 App. U.S. Code 1210, *et seq.*

3. The granting of a Preliminary Injunction herein will

not cause undue delay or loss to Defendant, but will prevent irreparable injury to Plaintiff.

This motion will be based on this notice of motion, on the affidavit of James J. Gallagher, and all of the other pleadings and papers on file in this action.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY
Attorney for Plaintiff

Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006
ST 3-0600

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC., PLAINTIFF,
v.
THE RENEGOTIATION BOARD, DEFENDANT.
Civil Action No. 1340-70

DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant, by its undersigned attorneys, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, respectfully moves this Court to dismiss the above-entitled action on the ground that the Court lacks jurisdiction over the subject matter of this action and the complaint fails to state a claim upon which relief can be granted. Defendant further opposes plaintiff's application for a temporary restraining order and preliminary injunction and respectfully requests the Court to deny plaintiff's motions.

In support of this motion the Court is respectfully referred to the points and authorities in support of defendant's motion to dismiss and in opposition to plaintiff's application for a temporary restraining order and preliminary injunction filed herewith and to Exhibit A attached hereto:

Respectfully submitted,

WILLIAM D. RUCKELSHAUS
Assistant Attorney General

THOMAS A. FLANNERY
United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

HARLAND F. LEATHERS
DAVID EPSTEIN
Attorneys, Department of Justice
Attorneys for Defendant

UNITED STATES DISTRICT COURT
CENTRAL DIVISION OF CALIFORNIA

HOLLY CORPORATION, Azura California, PLAINTIFF, v. THE RENEGOTIATION BOARD, DEFENDANT.	No. 69-198-JWC MEMORANDUM DECISION AND ORDER DENYING TEMPORARY INJUNCTION

Without deciding the question of jurisdiction, the temporary injunction which plaintiff seeks herein is hereby denied, for the following reasons:

1. There is little likelihood that plaintiff will succeed in the pending action as its demands are general in nature and apear to call for information in categories not made available to the public. 32 C.F.R. § 1480.9.

2. At least short of a hearing before the tax court, no irreparable injury will occur to the plaintiff if the renegotiation hearing is permitted.

DATED: February 11, 1969.

JESSE W. CURTIS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC. PLAINTIFF, v. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 1340-70

ORDER

Upon consideration of the complaint herein, the Application for a Temporary Restraining Order and Affidavit in support thereof, the Memorandum of Points and Authorities filed in support of the Application, and after oral argument of counsel for both parties, it appears to the Court as follows:

1. Plaintiff, during the years 1966 and 1967, performed Government contracts which are subject to The Renegotiation Act of 1951, as amended, 50 App. U.S.C. §§ 1211-1233 (1964 ed.)

2. Defendant has determined, by letters dated April 29, 1970, copies of which are attached to the complaint as Exhibits F and G, that Plaintiff realized excessive profits of $75,000.00 in Fiscal Year 1966 and $1,450,000.00 in Fiscal Year 1967. Those determinations will become final on May 12, 1970.

3. Plaintiff has requested by letter dated March 16, 1970, a copy of which is attached to the complaint as Exhibit E, that the Defendant produce certain designated records which Plaintiff believes will aid in the preparation of and presentation of its position before The Renegotiation Board for these fiscal years.

4. Defendant has repeatedly denied requests for production of documents made by this Plaintiff and by others. (See *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*, No. 22,635 (D.C. Cir., decided March 10, 1970)).

5. Unless the Defendant, The Renegotiation Board, is restrained and enjoined from continuing the renegotiation proceedings with respect to Plaintiff's Fiscal Years 1966 and 1967, the Board will proceed to a final determination prior to a determination of the Plaintiff's right to the pro-

duction of certain documents heretofore requested of The Renegotiation Board by the Plaintiff.

6. In light of the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board, supra,* it is likely that Plaintiff will be successful in this litigation and that Defendant will be required to produce these documents. Plaintiff will suffer irreparable injury if the documents are not produced prior to completion of the renegotiation proceedings.

WHEREFORE, it is by the Court this 6th day of May, 1970,

ORDERED:

That the Defendant, The Renegotiation Board, its agents, servants, employees and attorneys are hereby temporarily restrained from continuing with the renegotiation proceedings involving the Plaintiff, Bannercraft Clothing Company, Inc., for the Fiscal Years 1966 and 1967 until further order of this Court.

That Plaintiff's Motion for a Preliminary Injunction herein is set for hearing in this Court on May 15, 1970, at 9:30 A.M. o'clock.

That the above Restraining Order shall expire on ——— 1970, unless further extended by order of this Court, provided that Plaintiff first file a bond in the amount of $100.00 cash, or in the face amount of $100.00, with surety approved by the Court.

/s/ Jno. Lewis Smith, Jr.
Judge

A TRUE COPY
ROBERT M. STEARNS, Clerk
By Helen K. Bendure
Deputy Clerk

Cash dep. by pltf.
Undertaking ——— for $100
approved and filed 5-6-1970
ROBERT M. STEARNS, Clerk
By Helen K. Bendure, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC. PLAINTIFF, v. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 1340-70

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND RENEWAL OF MOTION TO DISMISS

Defendant, by its undersigned attorneys, hereby opposes plaintiff's motion for a Preliminary Injunction and respectfully requests the Court to deny plaintiff's motion. Defendant pursuant to Rule 12(b) of the Federal Rules of Civil Procedure further renews its Motion to Dismiss the above-entitled action on the grounds that the Court lacks jurisdiction over the subject matter of this action and the complaint fails to state a claim upon which relief can be granted.

In support of this motion defendant herein incorporates by reference its Motion to Dismiss and Opposition to plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction filed on May 5, 1970, as well as the Points and Authorities filed in connection therewith. In addition, the Court is respectfully referred to the Points and Authorities in support of defendant's Opposition to Plaintiff's Motion for Preliminary Injunction and Renewal of Motion to Dismiss and to Exhibit A-1 and Exhibit A attached hereto.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC., PLAINTIFF,
v.
THE RENEGOTIATION BOARD, DEFENDANT.
Civil Action No. 1340-70
Affidavit

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss

AFFIDAVIT

I, LAWRENCE E. HARTWIG, being first duly sworn under oath, depose and say:

1. I am the Chairman of the Renegotiation Board and as such am familiar with the procedures and operations of such Board and with the files relating to the renegotiation proceedings conducted with plaintiff for the fiscal years ended December 31, 1966 and December 31, 1967. I have read the Complaint for Injunction filed in this action and the Affidavit of James J. Gallagher.

2. Renegotiation proceedings with the plaintiff were commenced on July 5, 1967, with respect to the 1966 fiscal year and on November 15, 1968, with respect to the 1967 fiscal year. Pursuant to Section 105(c) of the Renegotiation Act of 1951, as amended (50 App. U.S.C. 1215(c)), the time within which renegotiation proceedings must be concluded with respect to plaintiff's 1967 fiscal year, will expire on November 15, 1970.

3. The Affidavit of James J. Gallagher refers to a Summary of Facts and Reasons for each of the plaintiff's fiscal years 1966 and 1967, respectively. Such summaries were prepared and issued by the Eastern Regional Renegotiation Board in connection with its determinations that plaintiff realized excessive profits of $75,000 and $1,400,000 in such fiscal years, respectively.

4. The Affidavit states that the Renegotiation Board thereafter made final determinations that plaintiff realized excessive profits of $75,000 in fiscal year 1966, and $1,450,000 in fiscal year 1967, and that plaintiff does not know what ac-

counts for the $50,000 difference between the determination for fiscal year 1967 and that made by the Eastern Regional Renegotiation Board.

5. With respect to the letters dated April 29, 1970, referred to in Paragraph 10 of plaintiff's Complaint for Injunction, notifying the plaintiff of the determination by the Renegotiation Board, the Board's regulations provide that, in order to assist the Contractor in determining whether or not it will enter into an agreement, the Board, upon request, will furnish a summary of the facts and reasons upon which the determination is based (32 C.F.R. 1477.3).

6. Plaintiff, through its attorney, by letter dated May 7, 1970, has requested such a summary of the facts and reasons upon which the final determination of the Board is based. A copy of such letter is attached as Exhibit "A." Such request includes a qualification which is not acceptable under the Board's regulations, and will require revision. In any event, the Board considers that it is restrained from complying with the request of the plaintiff by the Order of the United States District Court for the District of Columbia dated May 6, 1970, restraining the Renegotiation Board, its agents, servants, employees and attorneys from continuing the renegotiation proceedings involving the plaintiff for the fiscal years 1966 and 1967, until further order of the court.

/s/ Lawrence E. Hartwig
LAWRENCE E. HARTWIG

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 13th day of May, 1970.

/s/ Helen V. Allen
Notary Public

My commission expires May 14, 1974.

(SEAL)

EXHIBIT A

SELLERS, CONNER & CUNEO
Formerly
CUMMINGS & SELLERS
Attorneys and Counselors
Commonwealth Building
1625 K Street, Northwest
Washington, D.C. 20006
May 7, 1970

Mr. Nathan Bass, Secretary
The Renegotiation Board
1910 K Street, N.W.
Washington, D.C.

Re: Renegotiation Proceedings—
BANNERCRAFT CLOTHING COMPANY, INC.
Fiscal Years ended 1966 and 1967

Dear Mr. Bass:

This is to acknowledge receipt of your letter of April 29 concerning the above fiscal years of Bannercraft Clothing Company, Inc.

Pursuant to Section 1477.2 of the Regulations of the Board, I request that you send me a written summary of the facts and reasons upon which the final determination of the Board is based for each of these fiscal years. To comply with the formal requirements of this Section and without prejudice to the contractor's right to proffer further evidence after reviewing the Statement of Facts and Reasons, this is to advise you on behalf of Bannercraft Clothing Company, Inc. that we believe we have submitted all the evidence which we presently believe to be relevant to the renegotiation proceedings.

Very truly yours,

/s/ Robert L. Ackerly
ROBERT L. ACKERLY

RLA:js

EXHIBIT "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC. PLAINTIFF, v. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 1340-70

MOTION TO DISSOLVE PRELIMINARY INJUNCTION

Defendant, by its undersigned attorneys, hereby moves that the Order granting plaintiff's Motion for Preliminary Injunction entered on May 15, 1970, in the above-referenced action be dissolved. By this Order the Court enjoined further proceedings before the Renegotiation Board pending further Order of the Court. Defendant maintains that the reasons for continuing the injunction no longer exist and therefore the injunction should be dissolved.

In support of this Motion the Court is respectfully referred to the Points and Authorities in Support of Motion to Dissolve Preliminary Injunction. In addition, the Court is respectfully referred to the affidavit of Randolph Peoples accompanied by the Board's letter dated June 21, 1970, addressed to Robert L. Ackerly, Esquire, counsel for the plaintiff, attached thereto, both of which are identified as Defendant's Exhibit A.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS
Assistant Attorney General
THOMAS A. FLANNERY
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.,
PLAINTIFF,
v.
THE RENEGOTIATION BOARD,
DEFENDANT.
Civil Action No. 1340-70

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss

AFFIDAVIT

I, RANDOLPH PEOPLES, being duly sworn, depose and say:

1. I am employee as a clerk in the mailroom of The Renegotiation Board at its headquarters office, located at 1910 K Street, N.W., Washington, D.C.

2. Attached hereto is a copy of a letter dated July 21, 1970, by Howard W. Fensterstock, General Counsel of The Renegotiation Board, to Robert L. Ackerly, Esq., Messrs. Sellers, Conner & Cuneo, 1625 K Street, N.W., Washington, D.C. 20006. On July 21, 1970, I delivered the original of such letter to the addressee therein named by leaving the same, together with the enclosures therein described, with a receptionist in his office at the address last stated.

RANDOLPH PEOPLES

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this —— day of July 1970.

Notary Public

My commission expires

(SEAL)

THE RENEGOTIATION BOARD
Washington, D.C. 20446

Jul. 21, 1970

Robert L. Ackerly, Esq.
Messrs. Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

Re: Renegotiation Proceedings
Bannercraft Clothing Company, Inc.
Fiscal Years 1966 and 1967

Dear Mr. Ackerly:

This is in response to your letters dated March 16, and May 27, 1970, requesting access on behalf of Bannercraft Clothing Company, Inc. to records of the Board, pursuant to the Freedom of Information Act ("FIA"), 5 U.S.C. 552. Your letters were referred to me in accordance with RBR 1480.7(b). I am making available certain of the records requested and denying others, as detailed below.

Both of your letters relate to renegotiation proceedings with Bannercraft for its 1966 and 1967 fiscal years. Read together and in their entirety, they constitute a demand for the production of a large part of the files of the Board in such proceedings, as well as for certain records relating to certain named competitors of Bannercraft.

A. *The request of March 16, 1970*

Item 1

Interdepartmental and interagency communications between The Renegotiation Board and other Government agencies with respect to Bannercraft's bidding, award and performance of its renegotiable contracts for the fiscal years 1966 and 1967.

In my opinion, these records are exempt from disclosure under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9 (a)(3), (4), (5) and (7) and (b)(2).

Item 2

Investigatory or other factual reports prepared by employees of the Board containing facts which are

relevant to the Board's determination as to Bannercraft's renegotiable contracts for the years 1966 and 1967.

In my opinion, these records are likewise exempt under 5 U.S.C. 552(b)(3), (4) (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7).

Item 3

The final opinions, determinations, unilateral orders, agreements, clearance notices, letters not to proceed, and the summaries of facts and reasons on which unilateral orders, agreements, or determinations are based for the years 1962 through 1968 for the following companies:

Hart-Schaeffer & Marx—Chicago
Botany 500—Philadelphia
M. Wile & Sons—Buffalo, New York
Joseph H. Cohen & Sons—Philadelphia
Pincus Brothers
College Hall Fashions
Gutman & Sons—Philadelphia
Pembroke Clothing—Egg Harbor, New Jersey
Hirst Tyler & Company—Philadelphia
Amerson Clothing Company—Pleasantville, New Jersey
Gramaton Clothing—Fort River, Massachusetts

For the years 1962 through 1968, the Board issued 8 clearance notices and 1 renegotiation agreement to contractors included in the group of 11 companies named in this item of your request. A copy of each of these records is enclosed herewith. As authorized by the judgment of the United States Court of Appeals for the District of Columbia Circuit in the case of *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, —— F.2d ——, No. 22,635, March 10, 1970, identifying details have been deleted from each document in order to preserve the anonymity of the Board's records, to protect the privacy of the persons involved in the disposition of the individual cases, and to prevent the release of confidential information furnished to the Board by contractors subject to renegotiation under the Renegotiation Act of 1951, as amended, respecting their business and financial operations.

The Board did not issue a final opinion (i.e., a Statement of Facts and Reasons) or a Summary of Facts and Reasons to any of such contractors for any of the specified years.

Item 4

The facts upon which The Renegotiation Board concluded that Bannercraft's pricing policy was unreasonable in 1966.

This is not a request for records.

Item 5

An identification of those coat manufacturers with whom Bannercraft's available cost of production was compared as stated on page 4 of the Summary of Facts and Reasons for 1966, and with respect to each such manufacturer, deleting therefrom where necessary, such identification in the data as may be required, the same data described in paragraph 3 above.

This is not a request for records, except to the extent that it seeks, with respect to several manufacturers with whom Bannercraft's cost of production was compared, records of the same types as those described in Item 3 above. For the years 1962 through 1968, to such manufacturers, the Board issued 12 clearance notices, 2 orders and 4 agreements. A copy of each such document is enclosed herewith. Identifying details have been deleted therefrom for the reasons stated above in answer to your Item 3.

The Board did not issue a final opinion (Statement of Facts and Reasons) to any of such manufacturers for any of the specified years. The Board did issue one Summary of Facts and Reasons to one contractor in such group. In my opinion, such Summary is exempt under 5 U.S.C. 552(b)(3), (4) (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7).

Item 6

The "procurement information" described on page 4 of the Summary of Facts and Reasons for 1966 which was reviewed and which the Board contends indicated that there was a lack of effective price competition. It is requested that this data be made available in detail and, to the extent that it may be included in requests

heretofore stated, that it be identified as the data upon which the Board reached the conclusion that there was a lack of effective price competition.

In my opinion, to the extent that the procurement information referred to in this item consists of written records, such records are exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7) and (b)(2). In addition, to the extent that this item isolates a single statement in the Summary of Facts and Reasons issued by the Eastern Regional Renegotiation Board under date of December 29, 1969 for Bannercraft's 1966 fiscal year, and requests identification and production of all records upon which such statement was either wholly or partly based, the request is subject to the objections set forth below in response to your request of May 27, 1970.

B. *The request of May 27, 1970*

This request relates to the Summaries of Facts and Reasons issued by the Board on May 21, 1970 with respect to the 1966 and 1967 fiscal years of Bannercraft. It calls upon the Board to identify and produce any records relied upon by the Board in formulating selected statements or conclusions contained in such summaries.

In my opinion, the Board is not obligated, under the FIA or otherwise, to comply in precise terms with a letter which breaks down a lengthy opinion of the Board into a series of detached sentences lifted out of context, and demands that the Board establish and furnish such documentary support as it may have for each such sentence in turn. The Board's summary, like the opinion of a court or any other deciding authority, is an integrated document; it reflects the Board's over-all conclusion that the contractor realized excessive profits; it is predicated upon all written and oral information available to the Board, interpreted and evaluated according to its own judgment and expertise; and it cannot reasonably be compartmentalized in the manner sought.

Consequently, in my opinion, your request, Items 1 to 10, inclusive, should not be granted. My reasons, stated more fully, are as follows:

1. Your letter does not provide the reasonably adequate descriptions required to support a request under the FIA for the production of records. This is because all your items

are cast in terms of statements in a Summary of Facts and Reasons, without regard to the peculiar nature and function of such a summary in the renegotiation process. The FIA does not require the Board to comply with requests of this type, as hereinafter explained. See also RBR 1480.6(b).

2. Compliance with your request would impose upon the Board a severe burden that would frustrate the execution of its statutory mission and is not contemplated by the FIA. Compliance would involve not merely the location and production of identified or identifiable documents. It would require, rather, a careful and informed review of the analysis of the contractor's renegotiation cases for 1966 and 1967, in their entirety, by skilled professional personnel (lawyers, accountants, financial analysts and Board Members) who are critically necessary in carrying on the Board's duties; the complete retracing of the mental processes of evaluation, interpretation, inference and comparison which enter into the preparation of a summary; the selection of those documents which directly or indirectly contributed in whole or in part to the formulation of the several statements or opinions quoted in your request, a selection which might be possible only after dissecting away the nondocumentary sources involved, such as oral exchanges with contractor personnel, and the expertise of our staff, including familiarity with industrial reference works, the trade press, specialized economic studies, etc.; a determination of the exempt or nonexempt character of each such document; and the deletion of any identifying details or exempt matter contained in any such document, and possibly the rewriting of the document to restore coherence. The many hours of time that would necessarily be spent by professional personnel in responding to requests of this type would disrupt and unduly delay the processing of the Board's heavy calendar of renegotiation cases. Such activity would seriously impair the efficiency of the Board's operations, and would represent an unwarranted diversion of substantial amounts of Government funds. The Congress neither intended nor desired such results from the passage of the FIA. The FIA must be so construed, as a practical matter, as not to supersede other Federal laws imposing on Federal agencies tasks which they have the duty to perform, and the work assigned to the Renegotiation Board by the Congress cannot properly be stopped, or largely stopped,

to comply with a request of the character of yours. Even if full reimbursement for the cost of compliance could be calculated in advance, the Board would still be faced with the need to recruit and train the necessary additional professional personnel, and probably to obtain legislative and budgetary authorization therefor, if your request were to be met without disregarding the proper discharge of the Board's statutory mission.

3. The Renegotiation Act provides that the Board "shall endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits * * *" (§ 105(a)). The Supreme Court of the United States has described the renegotiation process as follows (*Lichter v. United States*, 334 U.S. 742, 791 (1948)):

> * * * Consistent with the primary need for speed and definiteness in these matters, the original administrative determinations by the respective Secretaries or by the Board were intended primarily as renegotiations in the course of which the interested parties were to have an opportunity to reach an agreement with the Government or in connection with which the Government, in the absence of such an agreement, might announce its unilateral determination of the amount of excessive profit claimed by the United States. This initial proceeding was not required to be a formal proceeding producing a record for review by some other authority. In lieu of such a procedure for review, the Second Renegotiation Act provided an adequate opportunity for a redetermination of the excessive profits, if any, *de novo* by the Tax Court.

4. The Tax Court proceeding affords all the constitutional safeguards of due process, including the procedural right to subpoena records. A request such as yours, under the FIA, tends to convert the informal, nonadversary proceeding before the Board, wisely designed as such, into a formal, adversary, trial-type proceeding like that prevailing in the Tax Court. The Renegotiation Act does not contemplate that the Board's effort to reach a quick agreement with the contractor, undertaken with a "primary need for speed and definiteness," should be encumbered by the employment of discovery or other litigation techniques. It was to further and facilitate this effort that the Board's func-

tions were exempted from the operation of the Administrative Procedure Act except as to the requirements of section 3 thereof (see Section 111 of the Renegotiation Act).

5. The FIA, on its part, was enacted to benefit members of the public generally, not to confer special benefits on those who are litigants or are engaged in business negotiations or renegotiations with the Government, especially if the effect would be to prejudice the public generally in its capacity as taxpayers. The FIA was intended primarily to operate without reference to the pendency of matters between the requestor and the agency, not as a device designed to affect or alter the course of pending matters or to enlarge the procedural rights of persons engaged in them. Specifically, the FIA does not contemplate that its provisions will be used as a discovery tool in the administrative negotiation stages of a renegotiation proceeding, in advance of the time when, by taking his case to the Tax Court, the contractor can enjoy all the procedural and discovery rights of a litigant. Such manipulation of the FIA would seriously undermine the renegotiation process as established by the Congress and recognized by the Supreme Court.

6. Statements made by the Board in a Summary of Facts and Reasons are based on information derived from a variety of sources, both written and unwritten. The written records often include documents wholly or partly exempt from disclosure, consisting of documents received from the contractor, from the procurement departments, or from other sources, public or private. In the preparation of a Summary, these are supplemented by oral communications, and by the inferences, judgment and expertise of Board personnel. The production of only the nonexempt, written records upon which a particular Summary statement or conclusion may directly or indirectly rest would be likely to disclose the basis of the statement only in part, and perhaps in small part. Such partial disclosures might properly be challenged by you as nonresponsive because, by themselves, they would be as likely to obscure as to explain the import of Summary statements to which your request relates them. A request for all the records underlying a particular statement in such a Summary is, thus, not fairly authorized by the FIA, either in its terms or its spirit, and

is also contrary to the prescribed course of renegotiation activities as established by law.

I decline, therefore, to make available to you the records requested in your letter of May 27, 1970.

I call your attention to the provisions of RBR 1480.7(e), providing for Board review of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,
/s/ Howard W. Fensterstock
HOWARD W. FENSTERSTOCK
General Counsel

Enclosures
As stated

cc: Central Files (4) w/original of incoming correspondence
Messrs. Hartwig, Harrison, Mattingly, Rinehart, & Whitehead
Mr. Bass
Mr. Kildea FIA File
—copies of encosures in Mr. Kildea's file
OGC FIA File
OGC Chron
Mr. Chick
Mr. Girard

Robert L. Saloschin, Esq.
Office of Legal Counsel
Department of Justice

HWFensterstock/spc
OGC—July 21, 1970

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC., PLAINTIFF, v. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 1340-70

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISSOLVE PRELIMINARY INJUNCTION

Plaintiff, through its undersigned counsel, hereby opposes Defendant's Motion to Dissolve this Court's Preliminary Injunction, entered on May 15, 1970.

Each of the bases upon which the Motion for Preliminary Injunction was requested, and upon which the Order granting such Motion was entered, exists today. No valid reasons have been advanced to justify modifying the Court's Order of May 15, 1970 in any way.

Defendant's Motion and accompanying Memorandum of Points and Authorities in support thereof are materially in error in both fact and law, and provide no valid basis for action by this Court. Defendant has failed substantially to comply with any of the prerequisites which would warrant the dissolution of the Preliminary Injunction.

In support of Plaintiff's opposition, the Court is respectfully referred to Plaintiff's Memorandum of Points and Authorities which is attached hereto.

Respectfully submitted,
/s/ Robert L. Ackerly
ROBERT L. ACKERLY
/s/ James J. Gallagher
JAMES J. GALLAGHER

SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C. 20006
783-0600
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC. PLAINTIFF, v. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 1340-70

ORDER

Upon consideration of Defendant's Motion to Dissolve Preliminary Injunction and Plaintiff's Opposition thereto and after hearing on said motion,

It is by the Court this 13th day of August, 1970,

ORDERED, that Defendant's Motion to Dissolve the Preliminary Injunction entered herein on May 15, 1970 is denied.

/s/ J. Curran
Judge

DAVID B. LILLY COMPANY

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7-1
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DAVID B. LILLY COMPANY

Relevant Docket Entries

Complaint; Application for Temporary Restraining Order; and Motion for Preliminary Injunction filed

Application for Temporary Restraining Order withdrawn with prejudice

Application for Temporary Restraining Order and Motion for Preliminary Injunction filed

Order granting Temporary Restraining Order

Motion to Dismiss and/or for Summary Judgment filed

Findings, Conclusions and Order entered

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
Industrial Park Place
P. O. Box 2285
Wilmington, Delaware 19899
a Delaware Corporation,

for itself and as successor in interest to

DELAWARE FASTENER CORPORATION
Industrial Park Place
P. O. Box 2285
Wilmington, Delaware 19899
a Delaware Corporation,

PLAINTIFFS,

VS.

THE RENEGOTIATION BOARD
1910 K Street, N. W.
Washington, D.C. 20006

DEFENDANT.

Civil Action
No. 2055-70

COMPLAINT FOR INJUNCTION AND ORDER OF PRODUCTION

(Pursuant to 5 U.S.C. § 552(a)(3); 81 Stat. 54)

Plaintiffs, DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION, by and through their undersigned counsel, for their Complaint against THE RENEGOTIATION BOARD, allege as follows:

1. This is a civil action over which this Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 in that the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Consitution and laws of the United States; and pursuant to 5 U.S.C. § 552(a)(3) in that identifiable records of THE RENEGOTIATION BOARD, for which Plaintiffs have made demand, are being improperly withheld from Plaintiffs, and such records are situated in the District of Columbia.

2. Plaintiff, DAVID B. LILLY COMPANY, INC., is, and at all times material has been, a corporation organized under the laws of the state of Delaware, with its principal place of business at Industrial Park Place, Wilmington, Delaware.

3. Plaintiff, DELAWARE FASTENER CORPORATION, was, and at all times material until January 23, 1970, had been, a corporation organized under the laws of the state of Delaware, with its principal place of business at Industrial Park Place, Wilmington, Delaware; on January 23, 1970, it was merged into DAVID B. LILLY COMPANY, INC. which succeeded to all rights and interests of DELAWARE FASTENER CORPORATION.

4. Defendant, THE RENEGOTIATION BOARD, established under 50 App. U.S.C. § 1217, is an agency of the United States within the meaning of 5 U.S.C. § 552(a), with its principal or "statutory" office in the District of Columbia.

5. During 1967, both DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION had income from sales and services, which subjected them to the Renegotiation Act of 1951, 50 App. U.S.C. §§ 1211 *et seq.*, as amended. Renegotiation proceedings for 1967 have been begun by the Renegotiation Board with respect to both corporations.

6. The Renegotiation Board, headquartered in Washington, D.C., has conducted the Renegotiation proceedings through its Eastern Regional Renegotiation Board, a delegate of the national Renegotiation Board also headquartered in Washington, D.C., which proceedings are denominated "David B. Lilly Company, Inc. No. 73216-67-A" and "Delaware Fastener Corporation No. 65322-67-A" respectively.

7. During the said renegotiation proceedings, the two corporations have supplied information from their own records to a representative of the Eastern Regional Renegotiation Board, namely Stanley Fishner, Renegotiator.

8. At a meeting on June 4, 1970, with Mr. Fishner, representatives of the two corporations were advised by Mr. Fishner that he was recommending that the two corporations pay a total of $700,000 to the government, less tax credits. Mr. Fishner further advised that the corporations had a right to a hearing before a "panel" made up of mem-

bers of the Eastern Regional Renegotiation Board, provided that such an appeal-type hearing was requested by a certain date; otherwise the corporations would lose such right and be forced to go either to the national Renegotiation Board for hearing or agree to Mr. Fishner's recommendation.

9. At the said meeting, Mr. Fishner was advised that the corporation's legal representative would, because of an approaching trial, be unable to give the matter the necessary consideration until the end of June or beginning of July, 1970; thereupon Mr. Fishner said that the corporations would have until the end of the week of July 6, 1970, to decide whether to request an appeal hearing before the Eastern Regional Renegotiation Board, or to appeal directly to the national Renegotiation Board or to agree to his recommendation without further appeal.

10. At the said meeting on June 4, 1970, Mr. Fishner also indicated that the Eastern Regional Renegotiation Board had already approved his recommendation.

11. On June 29, 1970, the corporations' legal representative called Mr. Fishner and advised that he was unable to reach a decision as to how to proceed, that he needed additional information for such a determination and was requesting data toward this end. Attached as Exhibit "A" hereto is a copy of the June 29, 1970, letter hand-delivered on that date to the Renegotiation Board (with copy to Mr. Fishner) demanding the production of certain documents, which demand letter is incorporated herein. In said letter, Plaintiffs sought production of the following records:

(1) All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

(2) All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Re-

negotiation Board in the referenced renegotiation proceedings.

(3) All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.

(4) All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

(5) All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referenced renegotiation proceedings.

12. Despite the said telephone conference and letter of June 29, 1970, the corporations received no response (contrary to the Board's own Regulations—32 C.F.R. § 1480.7), nor have any of the data and records been supplied as requested.

13. The Defendant's refusal even to acknowledge the said request for documents, and its failure to produce same, are a violation of 5 U.S.C. § 552(a)(3), thereby permitting this Court to order the production of such documents.

14. Unless the Defendant is restrained from further proceeding, acting or otherwise making a determination until such data is produced, irreparable harm will be sustained as follows:

(a) since the Eastern Regional Renegotiation Board had already approved Mr. Fishner's recommendation before such recommendation was made known to the Plaintiffs, Plaintiffs will be appealing to an agency already advised of the matter and having information and a predisposition towards the matter;

(b) unless Plaintiffs are apprised of the facts on which the Eastern Regional Board has "approved"

Mr. Fishner's recommendation, they cannot effectively present their case since they cannot know what matters can be rebutted, what information can be developed or what avenues should be pursued;

(c) without the information requested Plaintiffs are unable to intelligently decide whether to accept Mr. Fishner's recommendation and agree to enter into an "agreement of renegotiation." If Plaintiffs are, because of a lack of information, compelled to reject the "tentative recommendation," they subject themselves to the risk—the extent of which they cannot appraise because of this same lack of information—of having the Eastern Regional Board or the National Board increase the amount of alleged "excessive profits."

(d) without the information underlying the Defendant's position, Plaintiffs are in the dark as to even the arguments to be made;

(e) without the requested data, Plaintiffs can do nothing more than have a hearing before the Eastern Regional Renegotiation Board, reiterate what has already been presented (and which has evidently been given little credence by the Defendant) and hope that the Regional Board will further enlighten Plaintiffs as to the basis for its position, a slim likelihood in view of the total failure by the Defendant even to acknowledgge the demand for information;

(f) in view of the above, the Defendant's refusal to supply the information requested renders Plaintiffs' appeal rights useless or illusory and may cause Plaintiffs to expend time, effort and money, plus incur the waste of time, all to no avail;

(g) effective appeal rights are of critical importance in resolving a dispute involving substantial sums, and the granting of only a limited appeal right, by withholding information and making the appeal abortive or ineffectual constitutes a real deprivation of Plaintiffs' fundamental procedural and substantive due process rights;

(h) by loss of effective appeal rights, Plaintiffs will be forever deprived of their rights accorded by law and may require Plaintiffs to litigate, uninformed, at higher administrative or judicial levels when such may

well have been avoided by an effective appeal procedure before the Regional Board;

(i) once such an ineffectual appeal hearing is held, Plaintiffs will have forever lost the opportunity to take full advantage of a procedure afforded by law, and by such loss, will suffer irreparable loss and harm;

(j) unless Plaintiffs have access to the data requested, they cannot intelligently and meaningfully determine whether even to proceed before a panel of the Eastern Regional Renegotiation Board, and if they do so proceed, they will be unable to determine, as noted above, what points to rebut, what information to gather and what arguments to make;

(k) Plaintiffs have been advised that unless they elect no later than July 10, 1970 to have a hearing before the Eastern Regional Renegotiation Board, which hearing, Mr. Fishner advised, must be held within the ten days thereafter, they will lose such right; for the Plaintiffs to have to make a totally uninformed judgment as to whether to elect an abortive appeal procedure or alternatively waive it completely creates a dilemma and a loss of an effective legal right, for which loss they have no adequate remedy at law.

WHEREFORE, Plaintiffs ask for an Order compelling Defendant to produce the documents demanded, as described in paragraph 11 above, and further for an Order restraining Defendant from taking any action, from making any determination, from requiring Plaintiffs to elect a procedure and otherwise from affecting Plaintiffs' rights in renegotiation until such documents have been produced and Plaintiffs have been given a reasonable time to study same.

BURTON A. SCHWALB
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006
Telephone: 347-8500
Attorney for Plaintiffs

LAW OFFICES
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WASHINGTON, D. C. 20006
CABLE: ARFOX
202 347-8500

June 29, 1970
HAND DELIVERED

Nathan Bass, Secretary
Renegotiation Board
1910 K Street, N. W.
Washington, D. C. 20006

Re: David B. Lilly Co., No. 73216-67-A;
Delaware Fastener Corp., No. 65333-67-A

Dear Mr. Bass:

Renegotiation proceedings in the referenced matters are now in progress before the Renegotiation Board's Eastern Regional Renegotiation Board. On June 4, 1970, David B. Lilly, John Zebley and I met with Mr. Stanley Fishner, Renegotiator, Mr. Aubrey Bendure, Accountant and with Messrs. Burrell and O'Connor, all of the staff of the Board; at that time, Mr. Fishner advised of his recommendation and inquired whether the contractors wanted a conference with a panel of the Eastern Regional Renegotiation Board, which, Mr. Fishner advised, had already approved his recommendation on May 14, 1970.

I advised Mr. Fishner that I was involved in a trial which was scheduled to begin on June 15, 1970, in Delaware, that the trial was scheduled to last two weeks, that I would have to spend most of the week of June 8, 1970, preparing and thus could not devote sufficient time to an analysis of the matter until the weeks of June 29th and July 6th. We agreed at that time that I would advise Mr. Fishner, sometime during the week of July 6, 1970, as to the steps we decided to take.

EXHIBIT A

Fortunately, my trial in Delaware ended earlier in the week of June 22nd than anticipated, and I have had a further opportunity to go over the matter. I understand also that Mr. Fishner has contacted Mr. Lilly requesting that we decide earlier than the time originally agreed to.

While we are as anxious as you are to proceed with and dispose of the matter as quickly as possible, we find that we are unable to make a fully intelligent and informed judgment as to how to proceed without certain data and information relating to the Board's position. So that we may decide upon our course of action as to any further renegotiation proceedings, would you please furnish us with the following:

1. All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

2. All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Renegotiation Board in the referenced renegotiation proceedings.

3. All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.

4. All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

5. All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referred renegotiation proceedings.

Once we have had the opportunity to study the foregoing, we will be in a better position to determine whether or not to seek a conference with a panel of the Eastern Regional Board; we will also be in a position better to evaluate the matter and to determine what further or alternative steps we may take.

I am having this letter hand-delivered to you today (with copy to Mr. Fishner) to avoid mailing time and in hopes of expediting the matter so that we can advise you of our position during the week of July 6th as agreed upon. With this time limit in mind, I would appreciate your giving attention to our request as quickly as possible.

Sincerely yours,

Burton A. Schwalb

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC. a Delaware Corporation, for itself and as successor in interest to DELAWARE FASTENER CORPORATION a Delaware Corporation, PLAINTIFFS, VS. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. .....

AFFIDAVIT OF BURTON A. SCHWALB

I, BURTON A. SCHWALB, do on oath depose and say:

1. I have been counsel to David B. Lilly Company, Inc. and Delaware Fastener Corporation (both before and after the January 23, 1970 merger of Delaware Fastener Corporation into Divid B. Lilly Company, Inc.) with respect to their renegotiation proceedings for 1967, denominated "David B. Lilly Company, Inc.—No. 73216-67-A" and "Delaware Fastener Corporation—No. 65322-67-A".

2. For some time prior to June 4, 1970, the corporations provided information to the Renegotiation Board through its Renegotiator Stanley Fishner and its auditor Aubrey Bendure. David B. Lilly Company, Inc. had been subject to renegotiation for 1966 and was passed without demand for refund to the government; Delaware Fastener Corporation was passed for 1966 without renegotiation. Affiant's office also participated as counsel with respect to the year 1966. While providing information to the Renegotiation Board for 1967, the corporations were not advised until June 4, 1967 of any decision by the Board nor were the corporations given, by the Board, any information obtained by it from outside sources.

3. On June 4, 1970, I was present at a meeting with Mr. Fishner and others, at which time he advised of his recommendation that David B. Lilly Company, Inc. and Delaware Fastener Corporation be required to pay $200,000 and $500,000, respectively, an aggregate of $700,000, to the gov-

ernment; he also indicated that the Eastern Regional Renegotiation Board, an intermediate appeal level of the National Renegotiation Board, had approved his recommendation during the prior month.

4. We were further advised that we would have to elect whether or not to have an appeal hearing before a panel of the Eastern Regional Renegotiation Board, and, if we so elected, that such a hearing would be held within ten days of such election.

5. Mr. Fishner advised that if we did not seek such an appeal hearing, the corporations could either agree to his recommendation or appeal to the National Renegotiation Board.

6. Since we had not been apprised of Mr. Fishner's recommendation before June 4, 1970, we requested time in order to review the matter in detail and to consider what course of action to take. Because I was then preparing for a trial set to begin on June 15, 1970 (and scheduled for two weeks) and was also involved in other matters, we requested that we be given until the end of the week of July 6, 1970 within which to decide on a course of action so that I could have, in effect, the first two weeks of July, 1970 to explore the matter further.

7. After having an opportunity to go into the matter further during the week of June 22, 1970, I telephoned Mr. Fishner on June 29, 1970 and had a letter hand delivered to the Renegotiation Board on that date. In such communications, I advised that we did not feel we could make an enlightened judgment on how to proceed without having the information outlined in my June 29, 1970 letter, attached as Exhibit "A" to the Complaint filed herein, and incorporated herein.

8. No response to my request has been made by the Renegotiation Board.

9. Mr. Fishner advised that unless a hearing before such a panel of the Eastern Regional Renegotiation Board is elected during the week of July 6, 1970, the right thereto will be lost.

10. Mr. Fishner also advised that the Board was treating Plaintiffs in a manner comparable to other similarly situated contractors and that others had been contacted for information, but he would give no indication of the facts so obtained nor how the facts led to his specific recommenda-

tion as approved by the Eastern Regional Renegotiation Board.

11. Mr. Fishner has also advised that, on appeal, the amount recommended as a payment to the government could be increased.

12. While the corporations know what information they have given to the Board as to their operations, they do not know what information the Board obtained from other sources, nor the significance or qualitative or quantitative value given to such information. Consequently, the corporations have been unable to determine whether the Board has any information which should be corrected or implemented, what arguments to make, what facts to explore and develop and whether, by July 10, 1970, to elect the procedure of seeking an appeal to a panel of the Eastern Regional Renegotiation Board.

BURTON A. SCHWALB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC. a Delaware Corporation, for itself and as successor in interest to DELAWARE FASTENER CORPORATION a Delaware Corporation, PLAINTIFFS, VS. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. .....

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, by and through their undersigned counsel, pursuant to Rule 65(b), Federal Rules of Civil Procedure, respectfully move this Court to issue a Temporary Restraining Order restraining and enjoining Defendant, its agents, servants and employees, including the Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, in any way acting upon, or requiring Plaintiffs to take any action in connection with, the renegotiation proceedings relating to DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION for the fiscal year 1967, on the grounds that immediate and irreparable injury, loss and damage will result to Plaintiffs unless Defendant is restrained and enjoined forthwith as more fully appears in the Complaint and Affidavit filed in this action.

BURTON A. SCHWALB
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006
Telephone: 347-8500
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC. a Delaware Corporation, for itself and as successor in interest to DELAWARE FASTENER CORPORATION a Delaware Corporation, PLAINTIFFS, VS. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. .....

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by and through their undersigned counsel, respectfully move this Court to issue a Preliminary Injunction enjoining Defendant, its agents, servants and employees, including the Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, in any way acting upon, or requiring Plaintiffs to take any action in connection with, the renegotiation proceedings relating to DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION for the fiscal year 1967, on the grounds that immediate and irreparable injury, loss and damage will result to Plaintiffs unless Defendant is enjoined forthwith as more fully appears in the Complaint and Affidavit filed in this action.

BURTON A. SCHWALB
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006
Telephone: 347-8500

Attorney for Plaintiffs

PRAECIPE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

the 10th day of July 1970

DAVID B. LILLY CO., INC.	Civil Action
vs.	No. 2055-70
THE RENEGOTIATION BOARD	

The Clerk of said Court will please note the withdrawal, without prejudice to the refiling thereof, of the plaintiff's Application for a Temporary Restraining Order.

BURTON A. SCHWALB
1815 H Street, N. W.
Washington, D. C. 20006
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC. a Delaware Corporation, for itself and as successor in interest to DELAWARE FASTENER CORPORATION a Delaware Corporation, PLAINTIFFS, v. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 2055-70

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, by and through their undersigned counsel, pursuant to Rule 65(b), Federal Rules of Civil Procedure, respectfully move this Court to issue a Temporary Restrain Order restraining and enjoining Defendant, its agents, servants and employees, including the Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, in any way acting upon, or requiring Plaintiffs to take any action in connection with, the renegotiation proceedings relating to DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION for the fiscal year 1967, on the grounds that immediate and irreparable injury, loss and damage will result to Plaintiffs unless Defendant is restrained and enjoined forthwith as more fully appears in the Complaint and Affidavits filed in this action.

BURTON A. SCHWALB
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,
PLAINTIFFS,

v.

THE RENEGOTIATION BOARD,
DEFENDANT.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by and through their undersigned counsel, respectfully move this Court to issue a Preliminary Injunction enjoining Defendant, its agents, servants and employees, including the Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, in any way acting upon, or requiring Plaintiffs to take any action in connection with, the renegotiation proceedings relating to DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION for the fiscal year 1967, on the grounds that immediate and irreparable injury, loss and damage will result to Plaintiffs unless Defendant is enjoined forthwith as more fully appears in the Complaint and Affidavits filed in this action.

BURTON A. SCHWALB
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006
Telephone: 347-8500

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC. a Delaware Corporation, for itself and as successor in interest to DELAWARE FASTENER CORPORATION a Delaware Corporation, PLAINTIFFS, VS. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 2055-70

AFFIDAVIT OF BURTON A. SCHWALB

I, BURTON A. SCHWALB, do on oath depose and say:

1. I have been counsel to David B. Lilly Company, Inc. and Delaware Fastener Corporation (both before and after the January 23, 1970 merger of Delaware Fastener Corporation into David B. Lilly Company, Inc.) with respect to their renegotiation proceedings for 1967, denominated "David B. Lilly Company, Inc.—No. 73216-67-A" and "Delaware Fastener Corporation—No. 65322-67-A."

2. As counsel for David B. Lilly Company, Inc. and Delaware Fastener Corporation, I prepared an Affidavit on July 9, 1970, which Affidavit was filed with this Court in the captioned proceeding. The matters stated in my earlier Affidavit will not be repeated herein; rather, this Affidavit is submitted as an Addendum to the earlier Affidavit.

3. On the morning of July 9, 1970, David B. Lilly Company, Inc. and Delaware Fastener Corporation commenced the captioned action and filed an Application for a Temporary Restraining Order. Copies of the Complaint, the Application for Temporary Restraining Order, and my Affidavit were delivered to the United States Marshall, together with summonses, for service on the United States Attorney, The United States Attorney General and the Renegotiation Board, respectively. A copy of each of these pleadings was hand delivered to Joseph M. Hannon,

Esquire, Chief of the Civil Division of the District of Columbia United States Attorney's office.

4. A hearing on Plaintiffs' Application for a Temporary Restraining Order was set for 4:30 p.m., on July, 1970, before the Honorable William B. Jones. At approximately 3:00 p.m., Mr. Hannon and I were able to effect a stipulation, in which we agreed that the deadline of July 10, 1970 by which the Plaintiffs would otherwise be forced to elect what procedures to take, was cancelled and no new deadline was set. It was further agreed that the Board's Renegotiator, Mr. Stanley Fishner, would call me in the future for the purpose of our setting a new date, by mutual agreement, by which Plaintiffs must make a decision as to the procedures to be taken. If, at that future date, the Plaintiffs elect to have a hearing before a panel of the Eastern Regional Renegotiation Board, then a date for such a hearing would then be set by agreement. It was also understood that the Renegotiation Board would give consideration to Plaintiffs' request for documents and advise Plaintiffs at some future time (left open) as to its position. This agreement was confirmed in a letter dated July 9, 1970, which was hand delivered to Mr. Hannon on July 10, 1970. A copy of my letter is attached hereto as Exhibit "1".

5. Pursuant to this agreement, the hearing scheduled before Judge Jones at 4:30 p.m. on July 10, 1970 was cancelled, and a Praecipe was filed withdrawing Plaintiffs' Application for a Temporary Restraining Order, without prejudice to the refiling thereof.

6. On July 27, 1970, I received a letter, dated July 24, 1970, from Howard W. Fensterstock, General Counsel of the Renegotiation Board. In his letter, Mr. Fensterstock notified Plaintiffs that he refused to make available any of the documents requested by Plaintiffs. Mr. Fensterstock closed his letter by pointing out that pursuant to Renegotiation Board Regulation 1480.7(e), Plaintiffs have a right to obtain a review of his decision. The text of Regulation 1480.7(e) [32 C.F.R. § 1480.7(e)] is quoted on page 2 of Plaintiffs' Memorandum of Points and Authorities filed herewith. A copy of Mr. Fensterstock's letter of July 24, 1970 is attached as Exhibit 2.

7. On July 30, 1970, three days after receipt of Mr. Fensterstock's letter advising Plaintiffs of their right to

seek review of their request for documents within 20 days, I received a telephone call from the Board's Renegotiator, Mr. Stanley Fishner. In that telephone conversation, Mr. Fishner advised me that the Plaintiffs would have to decide by the close of the day of Friday, July 31, 1970 whether or not to accept his recommendation or, if they did not accept it, whether they want a hearing before the Eastern Regional Renegotiation Board on August 12, 1970. Mr. Fishner would not agree to a later date and he advised that if Plaintiffs did not agree with his recommendation and did not waive the hearing before the Eastern Board by the close of July 31, 1970, then the Eastern Board would, on August 12, 1970, review the matter. I requested that the matter not be set on August 12, 1970 before the Eastern Board since I intended to request the National Board to review the preliminary denial of our request for documents. Mr. Fishner advised that the Eastern Board was insisting on a date no later than August 12, 1970 whether or not Plaintiffs' request for documents was still pending final determination by the National Board. Since the Eastern Regional Renegotiation Board has the power to increase the renegotiator's recommendation, Plaintiffs believe that it would be unfair to require that they be placed in such jeopardy and be denied the full and effective administrative review on the merits because of the refusal to afford them the documents and information to which they believe they are entitled and which they believe they need for an effective presentation of their case.

8. At the present time, as on July 9, 1970, when I made my earlier Affidavit, the Plaintiff corporations do not know what information the Board obtained from other sources (e.g., "by comparing Plaintiffs to other similarly situated contractors"), or the significance or qualitative or quantitative value given to such information. Consequently, now as before, the Plaintiff corporations are unable to determine whether the Board has information which should be corrected or supplemented, what arguments to make, what facts to explore and develop and whether to accept or reject Mr. Fishner's tentative recommendation of excessive profits, or to permit the matter to go before a panel of the Eastern Regional Renegotiation Board, which panel, Mr. Fishner earlier advised, could increase the amount recommended as a payment to the Government.

/s/ Burton A. Schwalb
BURTON A. SCHWALB

Sworn and subscribed before me this 31st day of July, 1970.

/s/ Julia B. Coffey
Notary Public
My commission expires 4/14/74.

LAW OFFICES
ARENT, FOX, KINTNER, PLOTKIN
& KAHN
1100 FEDERAL BAR BUILDING
1815 H STREET, N. W.
WASHINGTON, D. C. 20006
CABLE: ARFOX
202 347-8500

July 9, 1970

Joseph M. Hannon, Esquire
Chief, Civil Division
Office of the United States Attorney
District of Columbia
United States Courthouse
Constitution Avenue and John Marshall Place, N. W.
Washington, D. C.

Re: Lilly Co. v. Renegotiation Board
Civil No. 2055-70 D.C. D.C.

Dear Mr. Hannon:

This will confirm our discussions today regarding the above case and our Application for a Temporary Restraining Order which was originally scheduled before Judge Jones at 4:30 p.m. today, and which hearing has been cancelled by agreement.

It was agreed that the deadline of tomorrow, July 10, 1970, by which the plaintiffs would otherwise have been forced to elect what procedures to take, has been cancelled and no new deadline has been set. It was further agreed that the Renegotiator (Mr. Fishner, who is presently on vacation), will call us in the future for purposes of our setting a new date, by mutual agreement, by which we must make an election as to the procedures to be taken; if, at that future date, the plaintiffs elect to have a hearing before a panel of the Eastern Regional Renegotiation Board, then a date for such hearing shall at that time be set by agreement.

It was also understood that the Renegotiation Board would give consideration to our request for documents and

advise us, at some future time (left open), as to its position. It was further understood that, if the plaintiffs were not satisfied with the Board's position as to documents, we would then, if we deemed it appropriate, have a hearing on our Motion for Preliminary Injunction or refile our Application for a Temporary Restraining Order, whichever happens to be more appropriate.

This is to make it clear that neither you nor the Board has committed itself in any way to produce the documents requested, but the purpose of the agreement is simply to permit the parties to have more time to resolve the matter of documents before a decision must be made by the plaintiffs as to the procedural steps to take.

Please let me know if any of the above is contrary to your understanding.

Please accept my sincerest gratitude for the very efficient and effective way in which you handled the matter; I am certain that you saved both the parties and the Court considerable time and expense and paved the way for an expeditious resolution of the problem.

Enclosed herewith is a copy of a praecipe withdrawing our Application for a Temporary Restraining Order without prejudice, which procedure was suggested by Mr. Foote, Judge Jones' Law Clerk.

Sincerely yours,
/s/ Burton A. Schwalb
BURTON A. SCHWALB

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC. a Delaware Corporation, for itself and as successor in interest to DELAWARE FASTENER CORPORATION a Delaware Corporation, PLAINTIFFS, VS. THE RENEGOTIATION BOARD, DEFENDANT.	Civil Action No. 2055-70

ORDER

Upon consideration of the Complaint herein, the Application for a Temporary Restraining Order and Affidavit in support thereof, the Memorandum of Points and Authorities filed in support of the Application, and after oral argument of counsel, it appears to the Court as follows:

1. Plaintiffs, during the fiscal year 1967, performed Government contracts which are subject to The Renegotiation Act of 1951, as amended, 50 App. U.S.C. §§ 1211-1233 (1964 ed.).

2. Defendant's Renegotiator, Mr. Stanley Fishner, has recommended trat Plaintiffs refund "excessive profits" totalling $700,000.00. The recommendation will be referred to a panel of Defendant's Eastern Regional Renegotiation Board for a final recommendation on August 12, 1970, unless Plaintiffs agree to enter into a "renegotiation agreement" in the amount of the "tentative recommendation" or decline a panel meeting on or before close of business on July 31, 1970.

3. Plaintiffs have requested by letter dated June 29, 1970, a copy of which is attached to the Complaint as Exhibit A, that the Defendant produce certain designated records which Plaintiffs believe will materially aid in determining whether to enter into an agreement or whether to request a panel meeting and if so, in preparation of and

presentation of their position before Defendant's Eastern Regional Renegotiation Board.

4. Defendant's General Counsel has denied Plaintiff's request, and Defendant has repeatedly denied requests for production of documents made by others (See *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*, No. 22,635 (D.C. Cir., decided March 10, 1970)).

5. Unless the Defendant, The Renegotiation Board, is restrained and enjoined from continuing the renegotiation proceedings with respect to Plaintiffs' fiscal year 1967, Plaintiffs will be irreparably harmed as more fully appears in the Complaint filed herein.

6. In light of the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board, supra*, it is likely that Plaintiffs will be successful in this litigation and that Defendant will be required to produce all or part of the documents sought. Plaintiffs will suffer irreparable injury if the documents are not produced sufficiently in advance of the date on which Plaintiffs must decide what course of action to pursue.

WHEREFORE, it is by the Court this 31st day of July, 1970,

ORDERED:

1. That Defendant, The Renegotiation Board, its agents, servants, employees, and attorneys are hereby temporarily restrained from continuing with, or instituting any further proceedings, in connection with the renegotiation proceedings involving the Plaintiffs, David B. Lilly Company, Inc. and Delaware Fasterner Corporation, for the fiscal year 1967; from requiring Plaintiffs to elect whether to enter into a "renegotiation agreement" or to request a panel meeting before Defendant's Eastern Regional Renegotiation Board; from taking any action to prejudice or curtail Plaintiffs' right to request or decline a panel meeting before Defendant's Eastern Regional Renegotiation Board; and from taking any other action which will affect, or in any way prejudice, Plaintiffs' rights, in connection with the renegotiation proceedings aforesaid, until further Order of this Court.

2. That Plaintiffs' Motion for a Preliminary Injunction

herein is set for hearing in this Court on ....., 1970, at ..... o'clock.

3. That the above Restraining Order shall expire on ...., 1970, unless further extended by Order of this Court, provided that Plaintiffs first file a bond in the amount of $..... cash, or in the face amount of $....., with surety approved by the Court.

.....
Judge

Date: .....

Time: .....

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC. a Delaware Corporation, for itself and as successor in interest to DELAWARE FASTENER CORPORATION a Delaware Corporation, Plaintiff, v. THE RENEGOTIATION BOARD, Defendant.	Civil Action No. 2055-70

ORDER

Upon consideration of the Complaint herein, Plaintiff's Application for a Temporary Restraining Order, supporting Affidavits, Memoranda of Points and Authorities, arguments of counsel, and further in consideration of this Court's Order dated July 31, 1970 and the factors recited therein, and in consideration of the fact that the said July 31, 1970 Order of this Court will expire on August 10, 1970 at a time when the United States District Judge entering said Order will be unavailable either for a hearing on Plaintiff's Motion for a Preliminary Injunction or for purposes of extending the said Temporary Restraining Order, and it appearing that the Plaintiff will suffer irreparable harm unless the said Temporary Restraining Order is extended, now therefore,

IT IS HEREBY ORDERED that the July 31, 1970 Temporary Restraining Order issued by this Court in the above case by and hereby is extended in its entirety and in full force and effect until August 20, 1970 on which date, at 10 o'clock a.m., a hearing shall be held on Plaintiff's Motion for a Preliminary Injunction, and further that Plaintiff's security in the amount of $100.00 cash shall be retained by this Court as the sole security for the Plaintiff's undertaking with respect to the July 31, 1970 Temporary Restraining Order and this Order extending the time thereof.

.....
United States District Judge

Date: .....
Time: .....

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC. a Delaware Corporation, for itself and as successor in interest to DELAWARE FASTENER CORPORATION a Delaware Corporation, Plaintiff, v. THE RENEGOTIATION BOARD, Defendant.	Civil Action No. 2055-70

MOTION OF DEFENDANT TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The defendant, by its counsel the United States Attorney for the District of Columbia, moves the Court to dismiss the complaint or, in the alternative, for summary judgment on the grounds that the complaint, the exhibits filed herein and by reference made a part hereof, demonstrate there is no issue or controversy, there is no claim upon which relief can be granted, there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

/s/
THOMAS A. FLANNERY
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
ROBERT M. WERDIG, JR.
Assistant United States Attorney

Jul 24, 1970

Burton A. Schwalb, Esq.
Messrs. Arent, Fox, Kintner,
Plotkin & Kahn
1100 Federal Bar Building
1815 M Street, NW
Washington, D. C. 20006

Re: David B. Lilly Co., No. 73216-67-A
Delaware Fastener Corp., No. 56322-67-A

Dear Mr. Schwalb:

This is in response to that portion of your letter dated June 29, 1970, which requests access on behalf of David B. Lilly Co., and Delaware Fastener Corp. to records of the Board, presumably pursuant to 5 U.S.C. 552. Your letter has been referred to me in accordance with RBR 1480.7(b).

For the reasons set forth below, I must decline to comply with your request.

RBR 1480.6(b) provides that a person who requests access to identifiable records must provide a reasonably specific description of the particular records sought, and that the Board will not comply with a request that does not provide an adequate description, or with a general or blanket request. In my opinion, the items numbered 1, 3, 4 and 5 in your letter constitute a general or blanket request for records within the meaning of this regulation.

In addition, I have concluded as follows with respect to the individual items of your request:

Item 1

All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

Item 4

All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

In my opinion, these records are exempt from disclosure under 5 U.S.C. 552(b)(1), (4), (5) and (7) and RBR 1480.9 (a)(3), (4), (5) and (7) and (b)(2).

Item 2

All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Renegotiation Board in the referenced renegotiation proceedings.

The records of the Board show that a copy of the accounting section of the Report of Renegotiation in each of the two proceedings in question was furnished to the contractor involved on February 5, 1970, pursuant to RBR 1472.3(d), and that certain revised pages were sent to each on May 26, 1970. In my opinion, the remainder of each such report is exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7).

Item 3

All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.

Item 5

All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referenced renegotiation proceedings.

In my opinion, these records are exempt from disclosure under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9 (a)(3), (4), (5) and (7).

I call your attention to the provisions for Board review of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

(Signed) Howard W. Fensterstock
HOWARD W. FENSTERSTOCK
General Counsel

LAW OFFICES
ARENT, FOX, KINTNER, PLOTKIN
& KAHN

1100 FEDERAL BAR BUILDING
1815 H STREET, N. W.
WASHINGTON, D. C. 20006

CABLE: ARFOX
202 347-8500

August 6, 1970

Nathan Bass, Secretary
The Renegotiation Board
1910 K Street, N.W.
Washington, D. C. 20006

Re: David B. Lilly Company, Inc. No. 73216-67-A
Delaware Fastener Corporation No. 65322-67-A

Dear Mr. Bass:

On June 29, 1970, I wrote to The Renegotiation Board requesting access to records of the Board on behalf of David B. Lilly Company, Inc. and Delaware Fastener Corporation in connection with the referenced renegotiation proceedings. Last week I received a letter dated July 24, 1970, from Howard W. Fensterstock, General Counsel to the Board. In his letter, Mr. Fensterstock denied any access to the requested records. I am writing at this time to ask that the Board review Mr. Fensterstock's action, as provided in RBR 1480.7(e) [32C. F. R. § 1480.7(e)]. For the Board's convenience, I am enclosing copies of my letter of June 29, 1970 and Mr. Fensterstock's letter of July 24, 1970.

In connection with the Court proceedings which have been instituted, we have filed Memorandum of Points and Authorities setting forth our position as regards our right to the documents requested under the Freedom of Information Act (5 U.S.C. § 552), and the holding of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, 425 F. 2d 578 (D. C. Cir. 1970).

In addition to the *Grumman Aircraft* case, it is our position that our right to the documents requested is supported further by *American Mail Line, Ltd. v. Gulick,* 411 F. 2d 696 (D. C. Cir. 1969), *Bristol Meyer Company v. FTC,* 424 F. 2d 935 (D.C. Cir. 1970), *General Services Administration v. Benson,* 415 F. 2d 878 (9th Cir. 1969) and, *Consumers Union of the United States, Inc. v. The Veterans Administration,* 301 F. Supp. 796 (S.D.N.Y. 1969). Moreover, we believe that a refusal to permit access to the requested records constitutes a denial of substantive and procedural due process.

As I am sure you have been advised, a hearing on our Motion for a Preliminary Injunction is set for August 20, 1970. In hopes of expediting these proceedings, and saving us each the expense and inconvenience incident to further court proceedings, I am having this letter hand-delivered to you today, with a copy to Mr. Werdig at the United States Attorney's Office. With the August 20th date in mind, I would appreciate the Board's giving our request as prompt attention as is possible.

Very sincerely,

/s/ Burton A. Schwalb
BURTON A. SCHWALB

Enclosure
cc: Robert Werdig, Esquire
(w/enc.)

Aug. 14, 1970

Burton A. Schwalb, Esq.
Messrs. Arent, Fox, Kintner,
Plotkin & Kahn
1100 Federal Bar Building
1815 H Street, NW
Washington, D. C. 20006

Re: David B. Lilly Co., No. 73216-67-A
Delaware Fastener Corp., No. 56322-67-A

Dear Mr. Schwalb:

In accordance with your letter dated August 6, 1970, and RBR 1480.7(e), the Board has reviewed the action of its General Counsel, as set forth in his letter of July 24, 1970 to you, denying your request on behalf of David B. Lilly Co., and Delaware Fastener Corp. for access to records of the Board pursuant to 5 U.S.C. 552.

As a result of such review, the Board has reached the following conclusions:

Item 1

All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

The Board has no such communications.

Item 2

All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Renegotiation Board in the referenced renegotiation proceedings.

The Report of Renegotiation is a report made to the regional board by the assigned renegotiator and accountant. The records of the Board show that a copy of the account-

ing section of this report in each of the two proceedings in question was furnished to the contractor involved on February 5, 1970, pursuant to RBR 1472.3(d), and that certain revised pages were sent to each on May 26, 1970.

The remainder (Part II) of each such report is the renegotiator's evaluation of the case; it consists of his analysis and evaluation of the essential facts, in the light of the statutory factors for determining excessive profits; his opinions of the contractor's contentions; and his recommendation to the regional board for a determination with respect to the existence and amount of excessive profits. In the opinion of the Board, this portion of each such report is exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7).

Item 4

All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delafare Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

It is customary for the Board to solicit reports from higher-tier contractors, if any, whom the contractor served as a subcontractor. Such reports are furnished in confidence, and consist primarily, not of factual material, but of the customers' opinions on various aspects of the contractor's pricing and performance. The disclosure of such reports to the contractor involved would (1) breach the protection promised to the writers, and thus impair the ability of the Board to obtain such reports in the future; and (2) expose to competitors of the contractor, and other interested members of the public, confidential commercial and financial information which in many cases the contractor himself would be least likely to make public. The Board is not concerned with whether such reports may be obtained by discovery in the Tax Court. In declining to divulge them, the Board is motivated by the conviction that their production at the administrative level is not required by the Public Information Act or the Renegotia-

tion Act and would be potentially harmful to their authors, to the Board, and perhaps to the contractor himself because any other member of the public would be equally entitled to such records under the Public Information Act.

Item 3

All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.

Item 5

All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referenced renegotiation proceedings.

In the opinion of the Board, these records are exempt from disclosure under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7). The legislative history of the Public Information Act, and the decisions thereunder, make it clear that internal Government records of the types described in these two items are not required to be made available to the public for inspection. In *Holly Corporation v. The Renegotiation Board* (Civil No. 69-198-JWC), by an order entered on July 30, 1970, the United States District Court for the Central District of California held that the following records of the Renegotiation Board were exempt from disclosure:

"D. Intra-agency memoranda and other communications consisting of staff advisory opinions, analyses and recommendations. These records include Part II of the Report of Renegotiation * * *."

For the foregoing reasons, the Board declines to comply with your request.

Very truly yours,

NATHAN BASS
Secretary of the Board

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC. a Delaware Corporation, for itself and as successor in interest to DELAWARE FASTENER CORPORATION a Delaware Corporation, Plaintiff,	Civil Action No. 2055-70
v.	
THE RENEGOTIATION BOARD, Defendant.	Affidavit

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss

AFFIDAVIT

I, WILLIAM HENRY HARRISON, being first duly sworn under oath, depose and say:

1. I am the Acting Chairman of the Renegotiation Board and I am familiar with the policies and operations of such Board, including the request of plaintiffs for documents described in its attorney's letter dated June 29, 1970 (Exhibit A to Complaint).

2. By Item I of such letter (Exhibit A to Complaint) plaintiffs requested that the Board make available:

> All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

The renegotiation file, with respect to plaintiffs, contains no such communications.

By Item II of such letter (Exhibit A to Complaint) plaintiffs requested:

> All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Renegotiation Board in the referenced renegotiation proceedings.

The Report of Renegotiation is a report made to the regional renegotiation board by the assigned renegotiator and accountant. The Board records, with respect to plaintiffs, show that a copy of the accounting section of this report in each of the two proceedings in question was furnished to the plaintiffs on February 5, 1970, and that certain revised pages were sent to the plaintiffs on May 26, 1970.

The remainder (Part II) of each such report is the renegotiatior's evaluation of the case; it consists of his analysis and evaluation of the essential facts, in the light of the statutory factors for determining excessive profits; his opinions of the contractor's contentions; and his recommendations to the regional renegotiation board for a determination with respect to the existence and amount of excessive profits. In the opinion of the Board, the portion of each such report is exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and 32 C.F.R. 1480.9(a), (3), (4), (5) and (7).

By Item IV of such letter (exhibit A to Complaint) plaintiffs requested that the Board make available.

> All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

It is customary for the Board to solicit reports from higher-tier contractors, if any, whom the plaintiffs served as a subcontractor. Such reports are furnished in confidence, and consist primarily, not of factual material, but of the customer's opinions on various aspects of the contractor's pricing and performance. The Board considers that the disclosure of such reports to the plaintiffs would (1) breach the protection promised to the writers of such re-

ports, and thus impair the ability of the Board to obtain such reports in the future; and (2) expose to competitors of the plaintiffs, and other interested members of the public, confidential commercial and financial information which in many cases the plaintiffs themselves would be least likely to make public. In declining to divulge such reports to plaintiffs, the Board is motivated by the conviction that their production is not required under the Public Information Act (5 U.S.C. 552) or the Renegotiation Act (50 U.S.C. App. 1211 et seq.) and would be potentially harmful to their authors, to the Board, and perhaps to the contractor himself, because any other member of the public would be equally entitled to such records under the Public Information Act.

By Items III and V of such letter (Exhibit A to Complaint) plaintiffs requested that the Board make available:

> All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.
>
> All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referenced renegotiation proceedings.

The Board considers that these records are exempt from disclosure under 5 U.S.C. 552(b)(3), (4), (5) and (7) and 32 C.F.R. 1480.9(a)(3), (4), (5) and (7).

In the opinion of the Board, the legislative history of the Public Information Act, and the decisions thereunder, make it clear that internal Government records of the types described in these two items are not required to be made available to the public for inspection. In the case of *Holly Corporation* v. *The Renegotiation Board* (Civil No. 69-198-JWC), by an order entered on July 30, 1970, the United States District Court for the Central District of California held that the following records of the Renegotiation Board were exempt from disclosure:

> Intra-agency memoranda and other communications

consisting of staff advisory opinions, analyses and recommendations. These records include Part II of the Report of Renegotiation * * *.

/s/ William Henry Harrison
WILLIAM HENRY HARRISON

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this .... day of..... 1970.

signed: .....
Notary Public

My commission expires ....., ...

(SEAL)

☆ U.S. Government Printing Office: 1973—494-732/503